TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 404.

WILLIAM A. DAYTON, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JAMES S. ORMAN AND WILLIAM CROOK, DOING BUSINESS AS ORMAN & CROOK, PETITIONER,

vs.

A. H. STANARD, TREASURER OF THE COUNTY OF PUEBLO, COLORADO, ET AL.

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 20, 1915.
CERTIORARI AND RETURN FILED MAY 3, 1915.

(24,624)

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 17, 1915.

a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1914, of said Court, Before the Honorable John E. Carland, Circuit Judge, and the Honorable Thomas C. Munger and the Honorable Frank A. Youmans, District Judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered, that heretofore transcripts of record pursuant to appeals allowed by the District Court of the United States for the District of Colorado were filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain causes wherein A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado, et al., are Appellants, and William L. Dayton, Trustee in Bankruptcy, etc., is Appellee, in which cause the transcript of record was filed and docketed in said Circuit Court of Appeals on May 15, 1914, as No. 4218, and also wherein William L. Dayton, Trustee in Bankruptcy, etc., is Appellant, and A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado, et al., are Appellees, in which cause the transcript of record was filed and docketed on May 21, 1914, as No. 4223. Said transcripts as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, are in the words and figures following, to-wit:

1 Pleas in the District Court of the United States for the District of Colorado, Sitting at Denver. In Bankruptcy.

Be it remembered, that heretofore, and on, to-wit, the sixteenth day of January, A. D. 1908, came James B. Orman and William Crook, partners doing business as Orman and Crook, by Milton Smith, Esquire, and Charles R. Brock, Esquire, their solicitors, and filed in said court their petition for adjudication in bankruptcy.

And afterwards, and on, to-wit, the sixteenth day of January, A. D. 1908, an order was entered of record adjudging the said James B. Orman and William Crook, partners doing business as Orman and Crook, to be bankrupt, and on the same day, an order was entered of record referring the matter to William B. Harrison, referee.

And afterwards and on, to-wit, the tenth day of July, A. D. 1912, came William L. Dayton, Esquire, trustee herein, by Harvey Riddell, Esquire, his solicitor and filed in said court his petition for restraining order.

And the said petition is in words and figures as follows to-wit:

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court. In Bankruptcy.

No. 1532.

In the Matter of the Estate of JAMES B. ORMAN and WILLIAM CROOK, Co-partners as Orman & Crook, Bankrupts.

WILLIAM L. DAYTON, Trustee in Bankruptcy of the Estate of James B. Orman and William Crook, Doing Business as Orman & Crook, a Co-partnership, Petitioner,

vs.

A. H. STANARD, Treasurer of the County of Pueblo, State of Colorado; Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts, E. P. Haver, N. S. Walpole, J. J. Frey, and Nixon Elliott, Respondents.

Petition.

Comes now William L. Dayton, the petitioner herein, and respectfully shows to the court:

2 1st. That on their voluntary petitions James B. Orman, and William Crook, copartners as Orman & Crook, were on the 16th day of January, A. D. 1908, adjudged bankrupts, being cause No. 1532 in this court, and that on the 6th day of February, 1908, the petitioner William L. Dayton was appointed, and ever since said date has continued to be and now is, the Trustee in Bankruptcy of said estate.

2nd. That among the assets of said bankrupt estate is certain real estate all situate, lying and being in the County of Pueblo, in the City of Pueblo, State of Colorado, described as follows, viz:

In Block thirty-nine (39): Lot twenty-eight (28);
In Block fifty (50): Lots eighteen (18), nineteen (19), twenty (20) and twenty-three (23);
In Block fifty-eight (58): Lots seventeen (17) and eighteen (18);
In Block fifty-nine (59): Lot thirty-one (31);
In Block one hundred seven (107): Lots twenty-three (23) and twenty-four (24);
In Block one hundred sixteen (116): Lots twenty-six (26) to thirty-two (32), both inclusive;
In Block one hundred twenty-five (125): Lots seven (7), eight (8), nine (9) and ten (10);

all in former South Pueblo, now a part of said City of Pueblo.

3rd. That by virtue of the proceedings aforesaid the title to said real estate passed to and became vested in your petitioner, as Trustee

in Bankruptcy, as aforesaid, and that ever since he has been such Trustee your petitioner has at all times been, and now is, in possession thereof.

4th. The taxes for the year 1906 and for the year 1907 have been assessed against said lots, and each of them, by the proper taxing officers of the state and county aforesaid, which taxes so assessed for the year 1906 were due and payable and collectible in the year 1907 and which taxes for the year 1907 were due, payable and collectible in the year 1908, but subsequent to the 6th day of February, 1908, and that at the time the title of said property became vested in petitioner as aforesaid, the said taxes were unpaid, but no step whatsoever toward the collection of said taxes had been taken by the
3 County Treasurer of said Pueblo County or any other public officer at the time said title vested in your petitioner and possession of said real estate was taken by your petitioner as aforesaid, except the mere assessment and extension of the said taxes upon the books of said County Treasurer as aforesaid.

5th. That there was also levied and assessed a special assessment for paving in South Union Avenue District of said city, against all the lots in Blocks thirty-nine (39) and fifty (50) aforesaid; and there was also levied a special assessment for storm and sanitary sewer in District No. 1 & A, against all of the lots in said Blocks 39, 50, 58, 59, 107, 116 and 125, aforesaid; but no step whatsoever, toward the collection of said taxes had been taken by the County Treasurer of said Pueblo County, or any other public officer, at the time said title vested in your petitioner and possession of said real estate was taken by petitioner as aforesaid, except the mere assessment and extension of said special assessments and taxes upon the books of said County Treasurer as aforesaid.

6th. That the defendant A. H. Stanard was at or about the times aforesaid, and ever since has been, and now is, the County Treasurer of said Pueblo County, Colorado.

7th. That in pursuance of the forms and proceedings provided by the statutes of the state of Colorado for the collection of unpaid delinquent taxes and special assessments, the said Stanard as County Treasurer as aforesaid did make, publish and advertise that he would sell and dispose of the said lots for and on account of the taxes and special assessments due upon said lots respectively, as aforesaid, and that in pursuance of said notice and publication the said Stanard, as County Treasurer, did on the 9th day of November, 1908, sell lot 28 in block 39 to the defendant E. G. Millard, for the taxes assessed thereon for the year 1906, aforesaid, and said County Treasurer did thereupon issue to the said Millard a certificate of purchase of said lot at said tax sale, in the form provided by the statutes of the state of Colorado, and the said Millard, as the holder of said certificate, paid the taxes thereafter falling due, as they became due, upon said lot, for the years 1908, 1909 and 1910.

That on said 9th day of November, 1908, the said County Treasurer did also, in manner and form as aforesaid, sell said lot 28, in block 39, to the defendant E. B. Haver, for the taxes assessed thereon

for the year 1907, and did issue to the said Haver a certificate of purchase therefor;

4 That on said 9th day of November, 1908, the said county treasurer did also sell said lot 28, in block 39, to the defendant Haver, to pay the special assessment or tax against the same for paving as aforesaid.

That on said 9th day of November, 1908, said County Treasurer did sell said lot 28 in block 39 to W. C. Carrington, on account of the special assessment or tax levied thereon for storm and sanitary sewer, and did issue to said Carrington a certificate of purchase therefor, and that said Carrington did thereafter assign to the defendant Roberts said certificate of purchase, and that said Roberts is now the owner and holder thereof;

That on the 4th day of November, 1912, said County Treasurer sold to the defendant Walpole said lot 28 in block 39, on account of the taxes assessed thereon for the year 1911, and did issue to said Walpole a certificate of purchase therefor, as aforesaid.

That as to each of said sales hereinbefore mentioned, as well as each of the sales hereinafter mentioned, the same were made after publication thereof in form as required by the statutes of the state of Colorado, and certificates of purchase as to each of said sales were issued by the said County Treasurer to the purchasers, respectively, upon each of their said purchases, in manner and form as aforesaid.

8th. That after advertisement as aforesaid the county treasurer did, on the 9th day of November, A. D. 1908, sell to the defendant Roberts lots eighteen, nineteen, twenty and twenty-three in block 50, for the taxes assessed thereon for the year 1906 and the year 1907, and did issue to the said Roberts a certificate of purchase as aforesaid, and that the said Roberts, as the holder of said certificate, paid the taxes as they fell due on said lots 18 and 23, assessed for the years 1908 and 1909, and the said Roberts also paid the taxes on all of said lots in block 50, assessed for the years 1910 and 1911; and that the county treasurer, on said 9th day of November, 1908, likewise sold said lots 18, 19 and 20, in said block 50, to the defendant Haver, for and on account of said paving tax due thereon; and the said Treasurer did, on said 9th day of November, 1908, sell to the defendant Roberts said lot 23, in block 50, for and on account of the paving tax due thereon;

And said county treasurer did on said 9th day of November, 1908, sell to the defendant Roberts said lots 18 and 23, block 50, for and on account of the special assessment or tax for storm and sanitary sewer, due thereon;

And said county treasurer did on said 9th day of November, 1908, sell to the defendant Kidd said lots 19 and 20, block 50, for

5 and on account of the special assessment or tax for the storm and sanitary sewer, due thereon, and that said defendant Kidd paid the general taxes, as they became due, assessed on said lots 19 and 20, block 50, for the years 1908 and 1909;

That on said 9th day of November, 1908, said county treasurer sold to defendant Haver lots 17 and 18, block 58, for the taxes assessed thereon for the year 1906;

That on said 9th day of November, 1908, said county treasurer sold to the defendant Kidd said lots 17 and 18, block 58, for and on account of the taxes assessed thereon for the year 1907, and that said Kidd paid the taxes assessed thereon, as they respectively became due, for the years 1908, 1909 and 1910;

That on said 9th day of November, 1908, said county treasurer sold said lots 17 and 18, in block 58, to one W. C. Carrington for and on account of the storm and sanitary sewer tax assessed thereon, and did issue to said Carrington a certificate of purchase therefor, and that said Carrington did thereafter assign to the defendant Roberts said certificate of purchase, and said Roberts is now the owner and holder thereof; and that on the 4th day of November, 1912, said County Treasurer sold to the defendant Walpole said lots 17 and 18, in block 58, for and on account of the general taxes assessed thereon for the year 1911;

That on said 9th day of November, 1908, said county treasurer likewise sold to D. T. Donnelly lot 31 in block 59, for the taxes assessed thereon for the year 1906, and did issue to said Donnelly a certificate of purchase therefor, and that on or about the 15th day of November, 1908, said Donnelly assigned said certificate of purchase to the defendant Stansbeck, who is now the owner and holder thereof; and that the said defendant Stansbeck thereafter paid, as the same respectively became due, the general taxes assessed against said lot 31 for the years 1909 and 1910;

That on said 9th day of November, 1908, said county treasurer likewise sold to the defendant Haver said lot 31, in block 59, for and on account of the taxes assessed thereon for the year 1907, and that the said Haver paid the taxes thereon assessed for the year 1908;

That on said 9th day of November, 1908, said county treasurer sold to T. D. Donnelly said lot 31 in block 59, for and on account of the storm and sanitary sewer tax assessed thereon as aforesaid,
6 and did issue to said Donnelly a certificate of purchase therefor, and that the said Donnelly thereafter assigned to the said defendant Hanlon said certificate of purchase, and the said Hanlon is now the owner and holder thereof; and that on the 4th day of November, 1912, said treasurer sold said lot 31, in block 59, to the defendant Fry, for and on account of the general tax assessed thereon for the year 1911.

That on said 9th day of November, 1908, said county treasurer likewise sold said lots 23 and 24 in block 107, to the defendant Kidd, for and on account of the taxes assessed thereon for the year 1906, and that the said Kidd paid the taxes, as they respectively became due, on said lots 23 and 24, assessed for the years 1908 and 1909.

That the said county treasurer did, on said 9th day of November, 1908, sell to the defendant Kidd said lots 23 and 24, block 107, for and on account of the taxes assessed thereon for [*they*] year 1907, and that the said Kidd did thereafter pay, when the same became due, the taxes assessed against said lots 23 and 24 for the year 1910;

That on said 9th day of November, 1908, the said county treasurer did likewise sell to the defendant Elliott said lots 23 and 24, in block 107, for and on account of the special assessment or tax assessed

against said lots for storm and sanitary sewer, and that the defendant Elliott did thereafter pay, when the same became due, the general taxes assessed against said lots 23 and 24 block 107, for the year 1911;

That on said 9th day of November, 1908, the said county treasurer did, as aforesaid, sell to the defendant Kidd lots 26, 27 and 28, in block 116, aforesaid, for and on account of the taxes assessed thereon for the year 1906, and that the said Kidd did pay, as they respectively became due, the taxes against said lots, assessed for the years 1908 and 1909;

That on said 9th day of November, 1908, said county treasurer did likewise sell to the defendant Haver said lots 29, 30, 31 and 32, in said block 116, for and on account of the taxes assessed thereon for the year 1906;

That on said 9th day of November, 1908, the said county treasurer did likewise sell to the defendant Roberts lots 26, 27 and 28, in block 116, for and on account of the taxes assessed thereon for the year 1907, and that the said Roberts paid, as they respectively became due, the taxes assessed against said lots for the years 1910 and 1911;

That on said 9th day of November, 1908, said county treasurer did likewise sell to the defendant Kidd said lots 29, 30, 31
7 and 32, block 116, for and on account of the taxes assessed thereon for the year 1907, and the said Kidd thereafter paid, as the same respectively became due, the taxes assessed on said lots for the [year-] 1908, 1909 and 1910;

That on said 9th day of November, 1908, said county treasurer did likewise sell to the defendant Kidd said lots 26 to 32, both inclusive, in block 116, for and on account of the special assessment or tax assessed thereon for storm and sanitary sewer; and that on the 4th day of November, 1912, the said county treasurer, in manner and form as aforesaid, did sell to the defendant Kidd said lots 29 to 32, both inclusive, for and on account of the taxes assessed thereon for the year 1911;

That on said 9th day of November, 1908, the said county treasurer did likewise sell to W. C. Carrington said lots 7, 8, 9 and 10, in block 125, for and on account of taxes assessed thereon for the year 1906, and did issue to the said Carrington a certificate of purchase therefor, and that the said Carrington did thereafter sell and assign, said certificate of purchase to the defendant Roberts, who is now the owner and holder thereof.

That on said 9th day of November, 1908, said county treasurer did likewise sell to the defendant Haver said lots 7 to 10, both inclusive, block 125, for and on account of the taxes assessed thereon for the year 1907, and that the said Haver paid the taxes thereafter assessed thereon for the year 1908;

That on the 8th day of November, 1909, said county treasurer sold to the defendant Kidd the said lots 7 to 10, both inclusive, in block 125, for and on account of the storm and sanitary sewer special assessment or tax assessed thereon, and that the defendant Kidd paid the general taxes assessed against the said lots for the years 1909 and 1911;

That on the 6th day of November, 1911, said county treasurer likewise sold to the defendant Stansbeck said lots 7 to 10, both inclusive, in block 125, for and on account of the taxes assessed thereon for the year 1910;

9th. That each of the said defendants is now the owner and holder of the certificate of purchase so as aforesaid alleged to have been issued or assigned to him or to her.

10th. That the said Stanard, as county treasurer as aforesaid, has served upon your petitioner, trustee as aforesaid, notices in form as required by law, that he, the said treasurer, would issue to the purchasers at such tax and special assessment sales, and to the
8 holder of the certificates of purchase thereat as aforesaid, treasurer's deeds for the properties specified in said certificate of purchase respectively, some of said deeds to be issued on the 15th day of July, 1912, and some to be issued on the 25th day of July, 1912.

11th. That unless restrained by this court, the said county treasurer will issue to the other holders of said certificates of purchase deeds for the property specified in their respective certificates of purchase at or about such times, as by the laws of the state of Colorado purchasers at tax sales and holders of certificates thereof would be entitled to deeds in cases of valid sales of property for taxes and special assessments.

12th. Petitioner further alleges that by reason of the premises aforesaid the said county treasurer was not authorized or empowered by law to make sales of said properties, and that said sales for said taxes and special assessments were, and each of them was, void, and that said certificates of purchase are, and each of them is, void, and that the said county treasurer has no power by law to issue deeds to the holders of said certificates of purchase, or to any of them.

13th. Your petitioner alleges that it is for the benefit of the said estate, and of the various creditors thereof, that said property be sold by him, as such trustee, freed from the lien of taxes and special assessments;

Wherefore, your petitioner prays:

1. That the said Stanard, County Treasurer, and his successor in office, be enjoined and restrained from issuing to any of the said defendants any tax deed based upon the said pretended sales of said properties for default in the payment of taxes and special assessments;

2. That pending the final adjudication of this case a temporary restraining order be issued against the said county treasurer, restraining him from issuing any such tax deeds;

3. That it be decreed that each and every of said pretended sales for taxes and special assessments is void and of no effect;

4. That your petitioner be authorized to sell said property free and clear of said taxes and special assessments and of said sales for taxes and special assessments, under and in puruance of and according to the terms of any order heretofore made or that may hereafter be made, by the referee having charge of the administration of this estate;

9 5. That the said defendants, and each of them other than the said Stanard, County Treasurer as aforesaid, be required

to look to the proceeds of the sales of the properties against which each of said defendants, respectively, hold certificates of purchase at said sales, and to said proceeds only, for any claim or demand or right which they respectively hold by reason of the premises aforesaid, and that they, and each of them, present to this court whatever claim or demand they and each of them may have thereto, to be paid respectively out of the proceeds from the sales of the respective premises against which they hold said respective certificates of purchase, if they should be adjudicated to have any such claim;

6. And for costs, and other proper relief.

HARVEY RIDDELL,
Attorney for William L. Dayton,
Trustee in Bankruptcy, Petitioner.

Endorsed: Filed in the District Court on June 23, 1913, 3 P. M.

(*Motion to Dismiss Petition for Restraining Order.*)

Comes now A. H. Stanard, as treasurer of the county of Pueblo, state of Colorado, Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts and J. J. Frey, by John F. Mail, Esq., their solicitor and here now, move to dismiss the bill of complaint or petition of the petitioner above named, and for ground of said motion say that the facts stated in said bill of complaint or petition are insufficient to constitute a cause of action against the respondents or ny of them in equity, and do not entitle the petitioner to the relief prayed for or to any relief.

JOHN F. MAIL,
Solicitor for the Respondents Last Above Named.

Endorsed: Filed in the District Court on Sept. 15, 1913, 3:15 P. M.

(*Order Overruling Motion to Dismiss Restraining Order.*)

Eleventh Day, November Term.

TUESDAY, November 25th, A. D. 1913.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the fourth day of November, A. D. 1913.

10 1532.

In the Matter of JAMES B. ORMAN and WILLIAM CROOK, Partners Doing Business as Orman and Crook. In Bankruptcy.

This matter comes on now to be heard upon the several motions of A. H. Stanard and others and of N. S. Walpole, to dismiss the petition of the Trustee for an injunction against A. H. Stanard, Treasurer of the county of Pueblo, state of Colorado, and is argued

by counsel Harvey Riddell, Esquire, appearing as solicitor for the trustee, Charles R. Brock, Esquire, appearing as solicitor for N. S. Walpole, and John F. Mail, Esquire, appearing as solicitor for A. H. Stanard and others. And thereupon on consideration thereof,

It is ordered by the court that the said motions, and each thereof, be and the same are hereby, denied.

In the District Court of the United States for the District of Colorado.

In Bankruptcy. No. 1532.

In the Matter of THE ESTATE OF JAMES B. ORMAN and WILLIAM CROOK, Copartners as Orman & Crook, Bankrupts.

WILLIAM L. DAYTON, Trustee in Bankruptcy of the Estate of James B. Orman and William Crook, Doing Business as Orman and Crook, a Copartnership, Petitioner,

vs.

A. H. STANARD, Treasurer of the County of Pueblo, State of Colorado; W. H. Stansbeck, E. G. Millard, Mamye Hanlon, F. W. Roberts, and Abel Kidd and J. J. Frey et al., Respondents.

Answer.

Come now A. H. Stanard, Treasurer of the county of Pueblo, state of Colorado, W. A. Stansbeck, E. G. Millard, Mamye Hanlon, F. W. Roberts and Abel Kidd and J. J. Frey, the respondents above named, and answering the petition of William L. Dayton, petitioner herein, say:

They deny that the taxes of 1906 and 1907 were due, payable and collectible in the year 1908, subsequent to the 6th day of February of the same year, but, on the contrary, say, that under and by virtue of the statutes of the state of Colorado in such case made and provided, the taxes of 1906 were due, payable and collectible on the first day of January, A. D. 1907; that the taxes of 1907 were due, payable and collectible on the first day of January, 1908; and that
11 under and by virtue of the laws of the state of Colorado and the ordinances of the city of Pueblo, the special taxes and assessments mentioned and described in said bill against the lands therein described were and are a lien upon said lands of equal force and dignity with the assessments for general state, county, school and city taxes.

Answering respondents deny that the said county treasurer was not authorized and empowered by law to sell said properties for taxes; deny that said sale was or is void; deny that said certificates of purchase, or any of them, are void; and deny that said Treasurer has no power to issue tax deeds to the holders of the said certificates.

Said answering respondents deny that it is for the benefit of said estate and the various conditions thereof that said property described

in bill be sold by the trustee, freed from the lien of taxes and special assessments or either of them.

Said answering respondents further say; that the matters and things alleged and set forth in said bill are insufficient in law to warrant the granting of the relief prayed for by said petitioner, or any relief.

JOHN F. MAIL,
Attorney for Respondents Answering Herein,
230 *Empire Building, Denver, Colorado.*

Endorsed: Filed in the District Court on Nov. 28, 1913, 11:40 A. M.

(*Decree.*)

Seventy-third Day, November Term.

MONDAY, March 16th, A. D. 1914.

Present: The Honorable Robert E. Lewis, District Judge, and the Honorable John A. Riner, Judge of the district court of the United States for the district of Wyoming, assigned to hold the district court of the United States for the district of Colorado, and other officers as noted on the tenth day of February, A. D. 1914.

And Before the Honorable Robert E. Lewis, District Judge, the following proceedings were had;

1532.

In the Matter of JAMES B. ORMAN and WILLIAM CROOK, Partners, Doing Business as Orman and Crook. In Bankruptcy.

This cause coming on to be heard upon the petition of the said Trustee in Bankruptcy, and upon the answers of the respond-
12 ents thereto, and the same having been argued by counsel,

It is ordered, that upon the 6th day of February, 1908, there came into the possession of the petitioner, William L. Dayton, as Trustee in Bankruptcy of the estate of James B. Orman and William Crook, doing business as Orman and Crook, a copartnership, and there has ever since been in his possession as such Trustee in Bankruptcy, and as part of the assets of said bankrupt estate, the following described real estate;

In block thirty-nine (39), lot twenty-eight (28);

In block fifty (50); lots eighteen (18), nineteen (19), twenty (20) and twenty-three (23);

In block fifty-eight (58); lots seventeen (17) and eighteen (18);

In block fifty-nine (59); lot thirty-one (31);

In block one hundred and seven (107); lots twenty-three (23) and twenty-four (24);

In block one hundred and sixteen (116); lots twenty-six (26), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty (30), thirty-one (31) and thirty-two (32);

In block one hundred and twenty-five (125); lots seven (7), eight (8), nine (9) and ten (10);

all in former South Pueblo, now a part of the City of Pueblo, in Pueblo County, Colorado;

that the sales of said real estate, made upon the 9th day of November, 1908, by the respondent, A. H. Stanard, as County Treasurer of Pueblo County, Colorado, for taxes theretofore assessed for the years 1906 and 1907 and for the special assessments assessed against said real estate, or parts thereof, by the said City of Pueblo for paving and for storm and sanitary sewer, and said sales of each and every part or parcel of any said real estate for either or any part of said taxes or special assessments, were and are utterly void and of no effect; that each and every certificate of purchase issued by said Treasurer to any of said respondents herein, or which any such respondent holds as assignee, by reason of or upon any such sale for any said taxes or special assessments, is null and void, and that each and all of said certificates of purchase is and are canceled and for naught held, and the said County Treasurer is hereby perpetually enjoined from issuing to any holder of any such certificate of purchase a tax deed or other conveyance of any said real estate, by reason of or based upon any such sale or certificate of purchase.

13 It is further ordered, that the said Trustee in Bankruptcy sell said real estate, or any parts or parcels thereof, free and clear of taxes and special assessments.

It is further ordered, that the respondents, and each of them have no right or claim to demand said Trustee in Bankruptcy, or of and from the general assets of said bankrupt estate, the payment of any sum paid by said respondents, or either of them, or the assignors of either of them, to said County Treasurer upon said sales for taxes and special assessments, nor for any sums paid thereafter for taxes or special assessments upon said property, or any part or parcel thereof, and that the same, and no part thereof, be paid from the general funds or assets of said bankrupt estate.

It is further ordered, that each of said respondents who became a purchaser or assignee of a purchaser of any said real estate, or any part or parcel thereof, at said tax sale of November 9th, 1908, has the right to be repaid out of the proceeds arising from the sale by the Trustee in Bankruptcy of that particular lot or parcel as to which said respondent or his assignor holds any such certificate of purchase, but not otherwise, for the amount of taxes assessed against said lot or parcel for the taxes of the year 1906, and for any said special assessments for paving or for storm and sanitary sewer, and for the interest or penalties that may have accrued upon any such tax or special assessment up to the 6th day of February, 1908, amounting to 10¼ per cent. of the tax so assessed, and also for the principal sum of any subsequent taxes that may have been paid by the holder of any such certificate of purchase, but that no said respondent be paid therefrom any interest penalties or costs, or other sum, over or beyond the principal of said taxes and special assess-

ments as assessed, except the interest and penalties that may have accrued up to February 6th, 1908, as aforesaid.

It is further ordered, that each of said respondents, or his or her agent, shall, within sixty days hereafter, file with William B. Harrison, Referee in Bankruptcy herein, or his successor in office, a verified statement of the amounts paid out and claimed by said respondent, as the right of said respondent is herein adjudged, and that in default thereof any such respondent so failing to file such statement shall have no right to participate in any distribution of the proceeds of any sale by the said Trustee in Bankruptcy. Sufficient of the proceeds arising from the sale by the Trustee in Bankruptcy of any part or parcel of said real estate shall be paid to the respondents, in accordance with the rights of the respondents as herein adjudged, upon the approval of the claims of the
14 respondents as herein provided, but in case the proceeds arising from the sale of any part or parcel of said real estate are not sufficient to pay in full all claims and charges against the same, as aforesaid, then said proceeds shall be divided or apportioned among the various claimants against said fund as may be equitable or proper, any claimant or the said Trustee to have the right to have the same adjusted and fixed by order of this court.

In the Matter of THE ESTATE OF JAMES B. ORMAN and WILLIAM CROOK, Copartners as Orman & Crook, Bankrupts.

No. 1532. In Bankruptcy.

WILLIAM L. DAYTON, Trustee in Bankruptcy of the Estate of James B. Orman and William Crook, Doing Business as Orman & Crook, a Copartnership, Petitioner,

vs.

A. H. STANARD, Treasurer of the County of Pueblo, State of Colorado; Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts, E. B. Haver, N. S. Walpole, J. J. Frey and Nixon Elliott, Respondents.

(Petition of Defendants, A. H. Stanard, Treasurer, etc., et al., for Appeal and Order Allowing Same.)

To the Honorable Robert E. Lewis, District Judge of the Above Court:

The above named defendants, A. H. Stanard, Treasurer of the County of Pueblo, state of Colorado, Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts and J. J. Frey, feeling themselves aggrieved by the order or decree made and entered in this cause on the 16th day of March, 1914, do hereby appeal from said decree or order to the circuit court of appeals for the eighth circuit for the reasons specified in their assignment of errors, which is filed herewith, and they pray that their appeal be allowed and that cita-

tion issue, as provided by law, and that the transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States circuit court of appeals for the eighth circuit, sitting at St. Louis, Missouri; and your petitioners further pray that the proper order touching the security to be required by them to perfect this appeal be made, the said appellants desiring that said decree or order be superseded as provided by law; and the said appellants further show to your Honor and to the court that they have, by writing and notice, duly requested the respondents, E. B. Haver, N. S. Walpole and Nixon Elliott, to join in this appeal, and they have refused so to do, the original of which notice, together with acceptance of service thereof and
15 refusal to join in this appeal, is hereto attached and made a part thereof.

And the said appellants, therefore, pray a severance and that they may be permitted to prosecute their appeal jointly, without the persons above named, to-wit: the said E. B. Haver, N. S. Walople and Nixon Elliott.

JOHN F. MAIL,
Solicitor for the said A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado; Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts, and J. J. Frey.

The petition is granted and the appeal allowed and the severance ordered and the supersedeas granted upon giving bond by the appellants, conditioned as required by law, in the sum of four thousand ($4,000.00) dollars.

Dated this 25th day of March, A. D. 1914.

ROB'T E. LEWIS,
District Judge.

Received a copy of the above petition and the attached assignment of errors this 24th day of March, A. D. 1914, and service of said petition and assignment of errors is hereby waived.

H. RIDDELL,
Solicitor for Petitioner.

Endorsed: Filed in the District Court on March 25, 1914, 2:30 P. M.

(*Assignment of Errors of the Defendants, A. H. Stanard, Treasurer, etc., et al.*)

And now on this the 25 day of March, A. D. 1914, came the defendants, A. H. Stanard, Treasurer of the county of Pueblo, state of Colorado, Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts and J. J. Frey, and say:

That the decree or order entered in the above cause on the 16th day of March, A. D. 1914, is erroneous and unjust to the defendants in this:

First. Because the petition of the petitioner herein doth not state facts sufficient to warrant the granting of the relief given by said decree or order, or any relief.

Second. Because the court erred in holding that the tax sale certificates of purchase, or any of them, mentioned in said decree or order are null and void.

16 Third. The court erred in holding that any of said tax sales were null and void.

Fourth. The court erred in decreeing or ordering the cancellation of said tax sale certificates.

Fifth. The court erred in perpetually, or at all, enjoining the county treasurer from issuing to the holder of such certificates a tax deed based upon such certificate of purchase.

Sixth. The court erred in decreeing or ordering the Trustee in Bankruptcy to sell said real estate, or any part or parcel thereof, free and clear of taxes and special assessments.

Seventh. The court erred in decreeing or ordering that said appealing respondents who became a purchaser or assignee of a purchaser of said real estate, or any part or parcel thereof, at said tax sale of November 9th, 1908, has the right to be repaid out of the proceeds arising from the sale by the Trustee in Bankruptcy of that particular lot or parcel as to which said respondent or his assignor holds any such certificate of purchase, but not otherwise, for the amount of taxes assessed against said lot or parcel for the taxes of the year 1906, and for any said special assessments for paving or for storm or sanitary sewer, and for the interest or penalties that may have accrued upon any such tax or special assessments up to the 6th day of February, 1908, and also for the principal sum of any subsequent taxes that may have been paid by the holder of any such certificate of purchase, but that no said respondent appellant be paid therefrom any interest, penalties or costs, or other sum, over or beyond the principal of said taxes and special assessments as assessed, except the interest and penalties that may have accrued up to February 6th, 1908.

Eighth. The court erred in decreeing or ordering that said respondent appellants should file their claim with the Referee in Bankruptcy.

Ninth. Because the said decree or order is contrary to law.

Tenth. Because the said decree or order is contrary to equity.

Eleventh. Because said decree or order is contrary to and is not justified by the evidence.

Wherefore, the defendants, A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado, Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts and J. J. Frey, pray

17 that said decree be reversed, and the district court directed to dismiss the bill.

JOHN F. MAIL,

Solicitor for A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado; Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts, and J. J. Frey.

Endorsed: Filed in the District Court on March 25, 1914, 2:30 P. M.

(*Notice of Appeal to Certain Co-defendants and Refusals to Join Therein.*)

To Hartman, Ballreich & O'Donnell, attorneys for E. B. Haver.
To Milton Smith, Charles R. Brock, and W. H. Ferguson, attorneys for N. S. Walpole.
To James D. Elliott, attorney for Nixon Elliott.

GENTLEMEN: You, and each of you, are hereby notified that A. H. Stanard, Treasurer of the County of Pueblo, state of Colorado, Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts and J. J. Frey, of the respondents in the above entitled cause, intend to take an appeal to the United States Circuit Court of Appeals for the eighth circuit from the order, decree and judgment of the court given and rendered in the above cause, in the above court, on the 16th day of March, A. D. 1914, and they hereby request you, and each of you, to join in said appeal.

Dated this 21st day of March, A. D. 1914.

JOHN F. MAIL,
Attorney for the Above Parties Stating Their Intention to Appeal.

Received a copy of the above notice, and the said E. B. Haver refuses to join in said appeal.

HARTMAN & BALLREICH,
Attorneys for E. B. Haver.

Received a copy of the above notice and request, and the said N. S. Walpole refuses to join in said appeal.

MILTON SMITH,
CHAS. R. BROCK,
W. H. FERGUSON,
Attorneys for N. S. Walpole.

18 Received a copy of the above notice and request, and the said Nixon Elliott refuses to join in said appeal.

JAMES G. ELLIOTT,
Attorney for Nixon Elliott.

Endorsed: Filed in the District Court on March 25, 1914, 2:30.

(*Bond on Appeal of the Defendants, A. H. Stanard, Treasurer, etc., et al.*)

Know all men by these presents, that we, A. H. Stanard, Treasurer of the county of Pueblo, state of Colorado, Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts and J. J. Frey, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto William L. Dayton, Trustee in Bankruptcy of the estate of James B. Orman and William Crook,

doing business as Orman & Crook, a co-partnership, in the full and just sum of four thousand ($4,000.00) dollars, to be paid to the said William L. Dayton, Trustee as above described, or his successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of March, in the year of our Lord one thousand, nine hundred and fourteen.

Whereas, lately at the November, 1913, term of the district court of the United States for the district of Colorado, sitting at Denver, in a suit pending in said court between William L. Dayton, Trustee as aforesaid, complainant, and A. H. Stanard, Treasurer of the county of Pueblo, State of Colorado, Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts, E. B. Haver, N. S. Walpole, J. J. Frey and Nixon Elliott, respondents, judgment was rendered against the said A. H. Stanard, Treasurer of the county of Pueblo, state of Colorado, Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts and J. J. Frey, and the said A. H. Stanard, Treasurer of the county of Pueblo, state of Colorado, Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts and J. J. Frey, having brought and been allowed an appeal to the United States circuit court of Appeals for the eighth circuit to reverse the judgment in the aforesaid suit, and a citation directed to the said William L. Dayton, Trustee as aforesaid, citing and admonishing him to be and appear in the United States circuit court of
19 appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the condition of the above obligation is such that if the said A. H. Stanard, Treasurer of the county of Pueblo, state of Colorado, Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts and J. J. Frey shall prosecute said appeal to effect and answer all damages and costs, if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

A. H. STANARD,
Treasurer of the County of Pueblo, Colorado,
ABEL KIDD,
W. H. STANSBECK,
E. G. MILLARD,
MAYME HANLON,
F. W. ROBERTS,
J. J. FREY,
By JOHN F. MAIL, *Their Attorney.*
AMERICAN SURETY COMPANY OF NEW YORK,
By H. N. HUTCHINSON,
Resident Vice-President.

[Corporate Seal American Surety Company.]

Attest:
S. M. CHAPIN,
Resident Assistant Secretary.

Approved this 25th day of March, A. D. 1914.

ROB'T E. LEWIS,
District Judge.

Endorsed: Filed in the District Court on March 25, 1914, 4:40 P. M.

(*Petition of Trustee for Appeal and Order Allowing Same.*)

To the Honorable Robert E. Lewis, District Judge of the above court:

The above named petitioner, William L. Dayton, as Trustee in Bankruptcy of the estate of James B. Orman and William Crook, doing business as Orman & Crook, a co-partnership, conceiving himself aggrieved by the decree made and entered on the 16th day of March, 1914, in the above entitled cause, does hereby appeal from said order and decree to the United States circuit court of appeals for the eighth circuit for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the eighth circuit.

Dated this 26th day of March, A. D. 1914.

HARVEY RIDDELL,
Solicitor for Petitioner and [and] *Cross-complainant.*

The foregoing claim of appeal is allowed.
Dated this 26th day of March, A. D. 1914.

ROB'T E. LEWIS,
District Judge.

Endorsed: Filed in the District Court on March 26, 1914, 2:30 P. M.

(*Assignment of Errors on Appeal of the Trustee.*)

Comes now the above named petitioner, William L. Dayton, as Trustee in Bankruptcy of the estate of James B. Orman and William Crook, doing business as Orman & Crook, a co-partnership, by Harvey Riddell, his solicitor, and says that in the decree heretofore rendered in this cause on the 16th day of March, 1914, the court erred in the following particulars:

I.

In decreeing that the respondents above named (except the respondent Stanard) were entitled to be paid and should be paid any sum whatsoever out of the amounts realized by the said Trustee in Bankruptcy from the sales of real estate described in the decree, or

that they should be repaid any sums whatever from any source on account of the taxes paid by said respondents, in said decree mentioned, or otherwise.

II.

In not decreeing that none of said respondents is entitled to be repaid any sum of money whatsoever by said Trustee, from any source on account of taxes paid by said respondents, or any of them.

Wherefore, the petitioner and cross-appellant prays that said decree be reversed as to such parts as are herein stated and referred to.

HARVEY RIDDELL,
Solicitor for William L. Dayton, as Trustee, Petitioner and Cross-appellant.

Endorsed: Filed in the District Court on March 26, 1914, 2:30 P. M.

(*Stipulation as to Testimony.*)

There was no evidence taken at the trial of this cause, but the following stipulation was made between counsel:

It was stipulated between counsel that immediately after his appointment as Trustee in Bankruptcy of the estate of Orman & Crook, in February, 1908, William L. Dayton, Trustee, caused to be filed in the office of the county clerk of Pueblo County, and in which the city of Pueblo is situated, a notice of his appointment as such trustee.

It is stipulated that the above was all the testimony or stipulation that was given or taken at the trial of said cause.

HARVEY RIDDELL,
Attorney for Petitioner.
JOHN F. MAIL,
Attorney for Defendants.

Endorsed: Filed in the District Court on April 9, 1914, 12:10 P. M.

(*Præcipe for Transcript.*)

To Charles W. Bishop, Clerk of the United States District Court for the District of Colorado.

SIR: You will please [caused] to be prepared for filing in the office of the Clerk of the United States circuit court of appeals for the eighth circuit, at St. Louis, in the above cause, the following papers, orders and documents constituting the transcript of the record in said cause on appeal to said United States circuit court of appeals:

1. Petition or bill of complaint.
2. Defendants' motion to dismiss petition.
3. Ruling on the motion to dismiss petition.
4. Answer of the defendants.

5. Stipulation as to testimony given and taken at said cause, together with said stipulation.
6. Final order or decree.
7. Petition for appeal.
8. Assignment of errors.
9. Petition and notice for severance, together with acceptance of service of said notice and refusal to join in appeal.
10. Order for appeal and severance and order fixing amount of bond.
11. Bond on appeal.
12. This præcipe and acceptance of service thereto.
13. Certificate of clerk.

JOHN F. MAIL,
Attorney for Defendants.

Denver, Colo., April 8th, 1914.

Received a copy of the above præcipe, and I agree that the same contains all of the papers necessary to a review of this cause on appeal, and I have no further request for papers or documents to be added thereto.

HARVEY RIDDELL,
Attorney for Petitioner.

Endorsed: Filed in the District Court on April 9, 1914, 12:10 P. M.

(*Citation on Appeal of A. H. Stanard, Treasurer, etc., et al.*)

UNITED STATES OF AMERICA,
Eighth Judicial Circuit, ss:

In the United States Circuit Court of Appeals for the [Eight-] Judicial Circuit.

The United States of America to William A. Dayton, Trustee in Bankruptcy of the Estate of James B. Orman and William Crook, Doing Business as Orman and Crook, Greeting:

You are hereby cited and admonished to be and appear in The United States Circuit Count of Appeals for the Eighth Cir-
23 cuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed by The District Court of the United States for the District of Colorado, sitting at Denver, wherein A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado, Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts, and J. J. Frey, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Robert E. Lewis, Judge of the district

court of the United States for the district of Colorado, at Denver, in said district, this twenty-fifth day of March, A. D. 1914.

ROBT. E. LEWIS, *Judge.*

Service of the within citation is hereby accepted for and on behalf of William L. Dayton, Trustee in Bankruptcy of the estate of James B. Orman and William Crook doing business as Orman and Crook, March 26th, 1914, at Denver, Colo.

HARVEY RIDDELL,
Solicitor for Appellee.

Endorsed: Filed in the District Court on March 26, 1914, 12:15 P. M.

Filed May 15, 1914. John D. Jordan, Clerk.

(*Citation on Appeal of William L. Dayton, Trustee, etc.*)

UNITED STATES OF AMERICA,
[*Eight-*] *Judicial Circuit, ss:*

In the United States Circuit Court of Appeals for the [Eight-] Judicial Circuit.

The United States of America to A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado; Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts, E. B. Haver, N. S. Walpole, J. J. Frey, and Nixon Elliott, Greeting:

You are hereby cited and admonished to be and appear in The United States Circuit Court of Appeals for the Eighth Circuit,
24 at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed by The District Court of the United States for the District of Colorado, sitting at Denver, wherein William L. Dayton, Trustee in Bankruptcy of the Estate of James B. Orman and William Crook, doing business as Orman and Crook [—] appellant and you are appellees to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Robert E. Lewis, Judge of the district court of the United States for the district of Colorado, at Denver, in said district, this twenty-sixth day of March, A. D. 1914.

ROBERT E. LEWIS, *Judge.*

Service of the within citation is hereby accepted for and on behalf of Defendants Apl. 8, 1914, Stanard, Kidd, Stansbeck, Milard, Hanlon, Roberts, & Frey.

JOHN F. MAIL,
Solicitor for Appellees.

Endorsed: Filed in the District Court on April 28, 1914, 11 A. M.

Filed May 21, 1914. John D. Jordan, Clerk.

(*Clerk's Certificate to Transcript.*)

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the district court of the United States for the district of Colorado, do hereby certify the above and foregoing pages numbered from one (1) to forty-seven (47), both inclusive, to be a true, perfect, and complete transcript and copy of petition for restraining order, motion to dismiss, answer, petition for appeal, assignment of errors, notice of appeal bond on appeal, stipulation as to testimony and two (2) orders of court, as set forth in the præcipe filed herein, together with a true copy of such præcipe, and petition for cross appeal and assignment of errors on cross appeal of William L. Dayton, as Trustee in Bankruptcy of the estate of James B. Orman and William Crook, doing business as Orman and Crook, heretofore filed or entered of record in said court in The Matter of James B. Orman and William Crook, partners doing business as Orman
25 and Crook, in Bankruptcy, as fully and completely as the same still remain on file and of record in my office at Denver.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, in said district, this twenty-eighth day of April, A. D. 1914.

[Seal U. S. Dist. Court, Dist. of Colorado.]

CHARLES W. BISHOP, *Clerk.*

No. 4218, Filed May 15, 1914. John D. Jordan, Clerk.
No. 4223, Filed May 21, 1914. John D. Jordan, Clerk.

26 And thereafter the following proceedings were had in said causes in the Circuit Court of Appeals, viz:

(*Appearance of Counsel for Appellants in Cause No.* 4218.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 4218.

A. H. STANARD, Treasurer, etc., et al., Appellants,
vs.
WILLIAM L. DAYTON, Trustee in Bankruptcy, etc.

The Clerk will enter my appearance as Counsel for the Appellants.

JOHN F. MAIL,
230 *Empire Building, Denver, Colorado.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 20, 1914.

(*Appearance of Counsel for Appellee in Cause No.* 4218.)

The Clerk will enter my appearance as Counsel for the Appellee.

HARVEY RIDDELL,
725 *E. & C. Bldg., Denver, Colo.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 21, 1914.

(*Appearance of Counsel for Appellant in Cause No.* 4223.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 4223.

WILLIAM L. DAYTON, Trustee, etc., Appellant,
vs.
A. H. STANARD, Treasurer, etc., et al.

27 The Clerk will enter my appearance as Counsel for the Appellant.

HARVEY RIDDELL,
725 *E. & C. Bldg., Denver, Colo.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, May 21, 1914.

(*Appearance of Counsel for Appellees in Cause No.* 4223.)

The Clerk will enter my appearance as Counsel for the Appellees.

JOHN F. MAIL.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, June 15, 1914.

(*Motion of Appellant to Dismiss Appeal as to Certain of the Appellees in Cause No.* 4223.)

Defendants below, E. P. Haver, N. S. Walpole and Nixon Elliott, not having appealed from the decree below, but having elected to abide by said decree, and not having been served with citation herein, and this appeal being a companion to and cross-bill with the appeal of A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado, et al., appellants, against William L. Dayton, Trustee in Bankruptcy, et al., Appellee, No. 4218, in this court this appeal is dismissed as to the appellees E. P. Haver, N. S. Walpole and Nixon Elliott.

HARVEY RIDDELL,
Attorney for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Aug. 3, 1914.

28 (*Order Dismissing Appeal as to Certain Appellees, E. B. Haver et al., in Cause No.* 4223.)

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1914, Tuesday, September 15, 1914.

No. 4223.

WILLIAM L. DAYTON, Trustee in Bankruptcy of the Estate of James B. Orman and William Crook, Doing Business as Orman and Crook, Appellant,

vs.

A. H. STANARD, Treasurer of the County of Pueblo, State of Colorado; Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts, E. B. Haver, N. S. Walpole, J. J. Frey, and Nixon Elliott.

Appeal from the District Court of the United States for the District of Colorado.

This cause came on to be heard upon the motion of counsel for appellant to dismiss this appeal as to certain of the appellees.

On consideration whereof, and in pursuance of said motion, it is now here ordered that this appeal be, and the same is hereby, dismissed as to the appellees, E. B. Haver, N. S. Walpole and Nixon Elliott, only.

September 15, 1914.

(*Order of Submission.*)

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1914, Tuesday, September 15, 1914.

No. 4218.

A. H. STANARD, Treasurer, etc., et al., Appellants,

vs.

WILLIAM L. DAYTON, Trustee in Bankruptcy, etc.

Appeal from the District Court of the United States for the District of Colorado.

29

No. 4223.

WILLIAM L. DAYTON, Trustee in Bankruptcy, etc., Appellant,

vs.

A. H. STANARD, Treasurer, etc., et al.

Appeal from the District Court of the United States for the District of Colorado.

These causes, being an appeal and a cross-appeal, having been called for hearing in their regular order, were, by agreement of coun-

sel in open Court, submitted to the Court on the transcripts of record from said District Court and the briefs of counsel filed herein.

30 (*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit.

December Term, A. D. 1914.

No. 4218.

A. H. STANARD, Treasurer of the County of Pueblo, State of Colorado, et al., Appellants,
vs.
WILLIAM L. DAYTON, Trustee in Bankruptcy, etc., Appellee,

Appeal from the District Court of the United States for the District of Colorado.

and

December Term, A. D. 1914.

No. 4223.

WILLIAM L. DAYTON, Trustee in Bankruptcy, etc., Appellant,
vs.
A. H. STANARD, Treasurer of the County of Pueblo, State of Colorado, et al., Appellees.

Appeal from the District Court of the United States for the District of Colorado.

Mr. John F. Mail, filed brief for appellants in No. 4218.
Mr. Harvey Riddell, filed brief for appellee and cross-appellant.

Before Carland, Circuit Judge, and T. C. Munger and Youmans, District Judges.

YOUMANS, *District Judge,* delivered the opinion of the Court:

On the 16th day of January, 1908, James B. Orman and William Crook, partners, as Orman & Crook, were adjudged bank-
31 rupts, and on the 6th of February, 1908, William L. Dayton was appointed trustee of the bankrupt estate. Among the assets belonging to said estate were a number of lots in Pueblo, Colorado. At the time of the adjudication the general taxes and certain special assessments against said lots for the years 1906 and 1907 were due. On the 9th of November, 1908, and at various times thereafter, the taxes remaining unpaid, the appellant, Stanard, as

County Treasurer of Pueblo County, after giving the notice required by law, proceeded to sell said lots for the general taxes and special assessments of 1906 and 1907. Certificates of purchase were issued to the purchasers at such sale, some of whom are appellants.

From time to time thereafter the appellants, other than Stanard, paid certain subsequent taxes and special assessments on the same lots. Notice was given, as required by law, that tax-deeds would be issued on the certificates of purchase.

The trustee brought this suit:

1. To enjoin the issuance of any tax deed for default in the payment of general taxes, or special assessments.

2. To have all tax sales declared void.

3. For authority to sell the property free and clear of liens for such taxes and special assessments.

4. To compel the appellants to look to the proceeds of the sales of the properties against which each of them held certificates of purchase, and to such proceeds only, for reimbursement, if they should be adjudged to have valid claims for reimbursement.

Appellants moved to dismiss the bill and the motion was overruled. They then filed answer which raises practically the same questions which were raised by the motion to dismiss.

The decree contained the following order:

"It is further ordered, that each of said respondents who became a purchaser or assignee of a purchaser of any said real estate, or any part or parcel thereof, at said tax sale of November 9th, 1908, has the right to be repaid out of the proceeds arising from the sale by the trustee in bankruptcy of that particular lot or parcel as to which said respondent or his assignor holds any such certificate of pur-
32 chase, but not otherwise, for the amount of taxes assessed against said lot or parcel for the taxes of the year 1906, and for any said special assessments for paving or for storm and sanitary sewer, and for the interest or penalties that may have accrued upon any such tax or special assessment up to the 6th day of February, 1908, amounting to 10¼ per cent. of the tax so assessed, and also for the principal sum of any subsequent taxes that may have been paid by the holder of any such certificate of purchase, but that no said respondent be paid therefrom any interest penalties or costs, or other sum, over or beyond the principal of said taxes and special assessments as assessed, except the interest and penalties that may have accrued up to February 6th, 1908, aforesaid."

The assignments of error in No. 4218 are substantially that the court erred:

1. In holding the tax certificates void.

2. In limiting the amount which should be refunded to each certificate holder to the taxes and special assessments, interest and penalties which accrued up to February 6th, 1908, and the principal sum paid by them after that date.

The trustee took a cross-appeal, which is No. 4223 here, and assigned as error the finding of the court that appellants should be reimbursed at all.

The bill alleges that the trustee has been in possession of all the property involved in this suit since his appointment as trustee. That allegation is not denied.

This case is governed by the decision of this court in the case of In re Eppstein, 156 Fed. 42. The court there said:

"We do not mean that property in the course of administration under the Bankruptcy Act is exempt from taxation, or freed from tax liens or claims theretofore fastened upon it (Swarts v. Hammer, 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1,060, and cases supra), but that it is in custodia legis, and that any act interfering with the court's possession, or with its power of control and disposal, and done without its sanction, is void. The general rule is practically conceded, but it is said that the procurement of the tax deed was not such an interference, because it merely perfected an incipient title, and did not disturb the possession. The distinction does not impress us. The issuance of the deed was the principal act
33 connected with the sale. If effective, it extinguished the right of redemption, which was still alive, transferred to the vendee the title and right of possession, became prima facie evidence of the validity of the sale and the proceedings anterior to it, and started the statute of limitations to running against any claim to the contrary. The attempt to thus strip the court of all but the naked possession was plainly an interference with its power of control and disposal, and consequently was of no effect without its sanction, although the possession was not then disturbed. Such is the effect of the ruling in Wiswall v. Sampson and Barton v. Barbour, supra. The cases of Rice v. Jerome, 97 Fed. 719, 38 C. C. A. 388, and Whitehead v. Farmer's Loan & Trust Co., 98 Fed. 10, 39 C. C. A. 34, relied upon as expressing a contrary conclusion, do not, as we think, go further than to hold that when the question is presented to the court before the tax deed is issued, and it appears that there is no lawful objection to the recognition of the tax claim and that there has been no offer to redeem, the fact that the property is in custodia legis is not of itself enough to warrant the court in withholding its sanction to, or in enjoining, the issuance of the deed."

Under Section 64*a* of the Bankrupt Act the court is required to "order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors."

Taxes accruing after bankruptcy proceedings are instituted are included among those to be paid. Swarts v. Hammer, 120 Fed. 256; s. c., 194, U. S. 441; City of Waco v. Bryan, 127 Fed. 79.

While the Bankrupt Act does not, in terms, provide for the payment of interest and penalties on taxes in default, we think such payment is clearly contemplated. The penalties imposed by law for non-payment of taxes become a part of the taxes. In re Prince & Waeter, 131 Fed. 546; In re Kallack, 147 Fed. 276; In re Scheight Bros., 177 Fed. 599.

In the case of Swarts v. Hammer, 194 U. S. 441, it is said that the referee allowed a tax bill "together with the accrued penalties and

fees provided by law." On review the District Court affirmed the order as to the amount of taxes, but disapproved it as to penalties and fees. It does not appear that exception was taken to that portion of the order disallowing penalties and fees. Neither the
34 court of appeals, nor the Supreme Court was called upon to consider that question.

Proceedings may be instituted by the proper State, County or Municipal officers to require the trustee to pay taxes. Hecox v. Teller Co., 198 Fed. 634.

Nevertheless, it is the duty of the trustee to ascertain what the taxes are and to secure authority to pay them. In re Kallack, 147 Fed. 276.

His failure to perform this duty will not suspend state statutes imposing penalties for non-payment. Tax sales, made after adjudication of bankruptcy of property belonging to the bankrupt estate may be avoided, but purchasers will be entitled to reimbursement for the amount paid at such sales and subsequent taxes paid by them, together with interest thereon as provided by the laws of Colorado on redemption from tax sales of lands, out of the general fund, regardless of the amount which the property may bring at bankruptcy sale.

Property may not be taken from estates in bankruptcy through the operation of state tax statutes. At the same time such property is subject to all taxes, and penalties for non-payment thereof, that other property is subject to.

The decree of the lower court in No. 4218 will, therefore, be modified in accordance with the views herein expressed, and, as modified, it will be Affirmed; and the cross-appeal in No. 4223, will be dismissed.

Filed January 4, 1915.

35 (*Decree in Cause No.* 4218.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1914, Monday, January 4, 1915.

No. 4218.

A. H. STANARD, Treasurer of the County of Pueblo, State of Colorado; Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayne Hanlon, F. W. Roberts, and J. J. Frey, Appellants,

vs.

WILLIAM L. DAYTON, Trustee in Bankruptcy of the Estate of James B. Orman and William Crook, Doing Business as Orman and Crook.

Appeal from the District Court of the United States for the District of Colorado.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, modified and that
36 as thus modified the said decree be, and the same is hereby, affirmed with costs; and that William L. Dayton, Trustee in Bankruptcy of the estate of James B. Orman and William Crook, doing business as Orman and Crook have and recover against A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado, Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts and J. J. Frey the sum of twenty dollars for his costs herein and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court for proceedings in accordance with the views expressed in the opinion of this Court.

January 4, 1915.

(*Decree in Cause No.* 4223.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1914, Monday, January 4, 1915.

No. 4223.

WILLIAM L. DAYTON, Trustee in Bankruptcy of the Estate of James B. Orman and William Crook, Doing Business as Orman and Crook, Appellant,

vs.

A. H. STANARD, Treasurer of the County of Pueblo, State of Colorado; Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts, and J. J. Frey.

Appeal from the District Court of the United States for the District of Colorado.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the appeal from the decree of the said District Court, in this cause, be, and the same is hereby,
37 dismissed with costs; and that A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado, Abel Kidd, W. H. Stanbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts and J. J. Frey have and recover against William L. Dayton, Trustee in Bankruptcy of the estate of James B. Orman and William Crook, doing business as Orman and Crook, the sum of twenty dollars for their costs herein and that the same be paid out of any funds in the hands of the said Trustee belonging to the bankrupt estate.

January 4, 1915.

(*Order to Correct Opinion in Certain Particulars.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1914, Thursday, February 4, 1915.

No. 4218.

A. H. STANARD, Treasurer, etc., et al., Appellants,
vs.
WILLIAM L. DAYTON, Trustee, etc.

Appeal from the District Court of the United States for the District of Colorado.

No. 4223.

WILLIAM L. DAYTON, Trustee, etc., Appellant,
vs.
A. H. STANARD, Treasurer, etc., et al.

Appeal from the District Court of the United States for the District of Colorado.

The above entitled causes came on to be heard upon the motion of counsel for William L. Dayton, Trustee, etc., for an amendment and more specific statement in the opinion of this Court in these causes.

On consideration whereof, and of the suggestions of counsel for A. H. Stanard, Treasurer, etc., et al. with respect to the said motion, it is now here ordered that the opinion of this Court
38 in these causes be, and the same is hereby amended so that the clause "together with legal interest thereon" in the third paragraph from the end of said opinion shall be, and is hereby, modified and amended so that said clause shall read as follows, viz: "together with interest thereon, as provided by the laws of Colorado on redemption from tax sales of land," and that the printed opinion of this Court be also amended in like manner.

February 4, 1915.

(*Præcipe for Transcript on Application for Certiorari.*)

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 4218.

A. H. STANARD, Treasurer, etc., et al., Appellants,
vs.
WILLIAM L. DAYTON, Trustee, etc., Appellee.

Præcipe.

To the Clerk of said Court:

I have requested you to prepare record in the above entitled cause for the purpose of applying for writ of certiorari to the Supreme Court of the United States.

In preparing said record you will please omit therefrom the motion of the appellee for the construction of the opinion of the Court as first delivered, and the suggestions of appellants in reply to that motion, but include the order of the Court and of course the opinion as finally delivered.

HARVEY RIDDELL,
Counsel for Trustee.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 15, 1915.

39 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcripts of the record from the District Court of the United States for the District of Colorado as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the præcipe of counsel for William L. Dayton, Trustee in Bankruptcy, etc., in certain causes in said Circuit Court of Appeals wherein A. H. Standard, Treasurer of the County of Pueblo, State of Colorado, et al., are Appellants and William L. Dayton, Trustee in Bankruptcy, etc., is Appellee, No. 4218, and also wherein William L. Dayton, Trustee in Bankruptcy, etc., is Appellant and A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado, et al., are Appellees, No. 4223, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the sixth day of March, A. D. 1915, a

mandate was issued out of said Circuit Court of Appeals in each of said causes, directed to the Judges of the District Court of the United States for the District of Colorado.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixteenth day of March, A. D. 1915.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Mar. 16, 1915. John D. Jordan.]

40 In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 4218.

A. H. STANNARD, Treasurer of the County of Pueblo, State of Colorado, et al., Appellants,

vs.

WILLIAM L. DAYTON, Trustee in Bankruptcy of the Estate of James B. Orman and William Crook, Doing Business as Orman & Crook, Appellee.

Stipulation.

It is hereby Stipulated that the transcript already filed in the office of the Clerk of the Supreme Court of the United States, with the petition for the writ of certiorari, be taken as return to said writ dated the 20th day of April, A. D. 1915.

JOHN F. MAIL,
Attorney for Appellants.
HARVEY RIDDELL,
Attorney for Appellee.

(Endorsed:) No. 4218. In the U. S. Circuit Court of Appeals for the Eighth Circuit. A. H. Stannard, Treasurer, etc., et al., Appellants, vs. William L. Dayton, Trustee in Bankruptcy, etc., Appellee. Stipulation as to Return to Writ of Certiorari. Filed Apr. 28, 1915. John D. Jordan, Clerk.

41 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Being informed that there is now pending before you a suit in which A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado, et al., are appellants, and William L. Dayton, Trustee in

Bankruptcy of the Estate of James B. Orman and William Crook, doing business as Orman & Crook, is appellee, No. 4218, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Colorado, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command
42 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twentieth day of April, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

43 *Return to Writ.*

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado, et al., Appellants, vs. William L. Dayton, Trustee in Bankruptcy of the Estate of James B. Orman and William Crook, doing business as Orman & Crook, No. 4218, is a full, true and complete transcript of all the pleadings, proceedings and record entries in said cause as mentioned in the certificate thereto.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of May, A. D. 1915.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled May 3, 1915. John D. Jordan.]

[Endorsed:] File No. 24624. Supreme Court of the United States, October Term, 1914. No. 880. William L. Dayton, Trustee, etc., vs. A. H. Stanard, Treasurer, etc., et al. Writ of Certiorari. Filed Apr. 28, 1915. John D. Jordan, Clerk.

44 [Endorsed:] File No. 24,624. Supreme Court U. S., October term, 1914. Term No. 880. William L. Dayton, trustee, etc., petitioner, vs. A. H. Stanard, treasurer, etc., et al. Writ of certiorari and return. Filed May 5, 1915.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

WILLIAM L. DAYTON, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JAMES B. ORMAN AND WILLIAM CROOK, DOING BUSINESS AS ORMAN & CROOK, A COPARTNERSHIP, PETITIONER,

vs.

A. H. STANARD, TREASURER OF THE COUNTY OF PUEBLO, STATE OF COLORADO, ABEL KIDD, W. H. STANSBECK, E. G. MILLARD, MAYME HANLON, F. W. ROBERTS AND J. J. FREY, RESPONDENTS.

MOTION FOR WRIT OF CERTIORARI.

Comes now William L. Dayton, Trustee in Bankruptcy of the Estate of James B. Orman and William Crook, doing business as Orman and Crook, a co-partnership, by Harvey Riddell, his counsel, and moves this Honorable Court that it shall, by certiorari or other proper process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, require said Court to certify to this Court, for its review and determination, a certain cause in said Circuit Court of Appeals lately

pending, wherein the respondents A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado; Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts and J. J. Frey, were appellants, and your petitioner, William L. Dayton, Trustee in Bankruptcy of the Estate of James B. Orman and William Crook, doing business as Orman and Crook, a co-partnership, was appellee, and to that end he now tenders herewith his petition and brief, with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

HARVEY RIDDELL,
Counsel for Petitioner.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

WILLIAM L. DAYTON, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JAMES B. ORMAN AND WILLIAM CROOK, DOING BUSINESS AS ORMAN & CROOK, A COPARTNERSHIP, PETITIONER,

vs.

A. H. STANARD, TREASURER OF THE COUNTY OF PUEBLO, STATE OF COLORADO, ABEL KIDD, W. H. STANSBECK, E. G. MILLARD, MAYME HANLON, F. W. ROBERTS AND J. J. FREY, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, REQUIRING IT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVISION AND DETERMINATION, THE DECREE RENDERED BY SAID CIRCUIT COURT OF APPEALS IN THE CASE OF A. H. STANARD, TREASURER OF THE COUNTY OF PUEBLO, STATE OF COLORADO; ABEL KIDD, W. H. STANSBECK, E. G. MILLARD, MAYME HANLON, F. W. ROBERTS AND J. J. FREY, APPEL-

LANTS, VS. WILLIAM L. DAYTON, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JAMES B. ORMAN AND WILLIAM CROOK, DOING BUSINESS AS ORMAN AND CROOK, A CO-PARTNERSHIP, APPELLEE, LATELY DEPENDING IN SAID CIRCUIT COURT OF APPEALS.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of William L. Dayton, Trustee in Bankruptcy of the Estate of James B. Orman and William Crook, doing business as Orman and Crook, a co-partnership, respectfully represents, as follows:

I.

The amount in controversy herein is more than fifteen thousand dollars, and the cause involves questions arising under the Bankruptcy Act which have never been authoritatively settled, so far as petitioner is advised, but there is a conflict of authority among the various circuits as to some of the principles which govern the correct disposition of these questions.

The questions themselves must have often arisen, though there are only meager reports upon some features of them, and these, as stated, are conflicting. If the decree stands it will mean that practically all of the assets of the bankrupt estate must be taken to satisfy it, leaving unpaid or at least making a ques-

tion whether a large amount of labor claims shall remain unpaid, to say nothing of general creditors.

The questions are these:

After real estate has passed into the possession of a Trustee in Bankruptcy and is being administered by him, is a sale of such property by a County Treasurer for general taxes and special assessments, proceeding under State statutes as if bankruptcy had not intervened, void or only voidable?

Have the purchasers at such tax sales any right or equity to demand repayment by the Trustee in Bankruptcy of the amount paid by them at such tax sales?

If such purchasers have a right or equity to demand such repayment, is it only for the principal sum of the taxes, without costs, interest and penalties, or is it for an amount including these?

If such purchasers have a right or equity as to some or all of such amounts, does that right or equity extend to requiring the Trustee to pay the same out of the *general* assets in his hands, as if he were paying taxes due the public, or is such right or equity limited to the proceeds arising from the sale of the particular pieces of land purchased at such tax sales?

Are the costs, interest and penalties, or either of them, part of the taxes to be paid, either when payment is made directly to officers collecting for the public or when paid to purchasers at tax sales, under the circumstances here?

Are such tax sales void in the full sense that purchasers take *caveat emptor,* or are they only voidable so that they can be set aside only on equitable conditions, and if so, what are those conditions?

On January 16, 1908, the partnership of Orman and Crook, and the individual members of that partnership, were adjudged bankrupt by the United States District Court for Colorado, and on February 6, 1908, the petitioner, Dayton, was appointed Trustee in all three estates, and ever since that time has been in the possession of the real estate, among other assets, of the bankrupt estate of said firm, being the real estate referred to herein. The firm and the individual members had a large amount of creditors and controversy and litigation immediately arose. There was a mortgage, in the form of a deed, on all this real estate, and other property, to secure partnership obligations of some two or three hundred thousand dollars due a bank. The Trustee assaulted that mortgage as unlawful preference. After a fierce contest the mortgage was vacated at the end of two or three years' litigation. Thereupon creditors of the individual members of the firm instituted litigation, asserting that this real estate was not firm assets, but belonged to the individual members, an undivided half to each, and should be administered in that way in the individual estates. That litigation was terminated only about the time the present proceedings were begun. At that time the Circuit Court of Appeals of this circuit had held that the bankruptcy of the firm did not include the bankruptcy of its members, but that each was a distinct proceeding. (In re Bertenshaw, 157 Fed., 363.) Hence the Trustee was unable to dispose of the property and give a clear title till the litigation as to the ownership was determined, and thus raise necessary funds. This is stated in justice to the Trustee, showing why taxes for so many

years remained unpaid, and likewise accounts for the importance of the questions herein, as to costs, interest and penalties.

In the meantime, and on the 9th day of November, 1908, Stanard, as County Treasurer of Pueblo County, Colorado, sold this real estate, consisting of a large number of lots in the City of Pueblo, Colorado, at tax sale, just as if bankruptcy of Orman and Crook had not taken place, at which sale the other respondents became purchasers, each for certain of the lots; in fact, the affair was much more complicated than this simple statement, the conditions as to one of these lots being typical of all. For instance, Lot 28, Block 39, was sold to respondent Millard for the taxes of 1906; sold to one Haver for the taxes of 1907; sold to Haver for special assessment for paving; sold to one Carrington for special assessment for storm and sanitary sewer, who assigned his certificate of purchase to respondent Roberts; and, on November 4, 1912, was, at another tax sale, sold to one Walpole for the taxes of 1911. Various holders of these certificates paid taxes on these lots for various subsequent years, some for certain years and others for other years, apparently upon no system. So, as to all the lots and blocks.

Under the Colorado statute a county treasurer making sale of lands issues to the purchaser a certificate of purchase, and if the property is not redeemed from such tax sale within three years, and after the compliance with certain conditions not material here, the purchaser is entitled to a tax deed. In the meantime the amount bid bears a large penalty and interest, and to effect redemption, this, also, must be paid.

The time being about to expire, and, in fact, in some instances having expired, after which tax deeds could be demanded, but before any deeds were demanded or issued, the Trustee in Bankruptcy filed his petition in the District Court in that estate against all of the holders of such certificates of purchase, seeking the cancelation thereof, and the clearing up of these apparent encumbrances, so that the property could be sold advantageously, asking relief that the Treasurer be restrained from issuing such tax deeds; that the sales and certificates thereon be adjudged void; that the petitioner be authorized to sell the property free and clear therefrom, and that in the event it should be held that the holders of these certificates were entitled to be repaid any sum whatsoever it be limited to the funds arising from the sale of the particular pieces of property against which each held such certificates, instead of from the general assets of the estate (Rec., fol. 15).

To this, answer was filed, presenting, in fact, only a question of law, it being admitted that the facts stated in the Trustee's petition were true, except as to a stipulation of one fact not material here.

The trial court adjudged these tax sales void and canceled all certificates of purchase. It, however, held that the holders of these certificates should be paid the *principal* of the amount of the taxes and special assessments paid by them, without any costs, interest or penalties, except that as 10¼ per cent interest had accrued upon the taxes of 1906 at the time the Trustee took possession, that much was added to the principal of the taxes of that year, but that the repayment of these amounts should be only from the

proceeds of the particular lots of which each holder was a purchaser, and not from the general funds of the estate (Rec., fols. 22-26).

Certain holders of such certificates, and who were made parties defendant to that petition, elected to abide by the decree and the Trustee was willing so to do, but certain others, being the respondents here, took their appeal to the Circuit Court of Appeals, and as to them the Trustee took his cross-appeal as to so much of the decree as adjudged that those appellants were entitled to be repaid any sum whatsoever.

On January 4, 1915, the Circuit Court of Appeals rendered its decree dismissing the cross-appeal of the Trustee, doubtless because the proper decree, according to its view, could be entered in the main appeal, and it modified the decree of the court below to such extent as amounts to a reversal of the decree of the trial court—modifying it so as to provide that the holders of the certificates of purchase were entitled to be "reimbursed" for the sums bid at the tax sales, "together with legal interest thereon". As the last quoted language was not plain, the Trustee filed his motion that this language be made plain, and thereupon that Court interpreted the language to mean or elaborated the expression to say "together with interest thereon as provided by the laws of Colorado on redemption from tax sales of lands".

That the effect of such decree is to compel the Trustee to pay the holders of such certificates an amount as if he were redeeming from such sales, although, as petitioner is advised, such sales are void, and the effect of such decree is to make reimbursement and redemption practically identical.

Petitioner alleges that such tax sales were absolutely void, as he is advised, and that such purchasers are entitled to be repaid no sum whatsoever from any source, or, if he is mistaken in this, that "reimbursement" to them of the amount paid at such tax sales should, at most, include interest thereon at the ordinary rate provided by the statutes of Colorado as to overdue money, to-wit, Eight per cent.

Petitioner further states that if said purchasers are entitled to be reimbursed in any sum whatsoever it is a right arising upon general principles of equity and outside of the Bankrupt Law; that they are not entitled to be subrogated or put in the place of the County Treasurer or the public as to such payments, and that any equity to be repaid such sums should be limited to the proceeds of the porperty purchased by them.

Petitioner says that the costs, penalties and interest accruing upon taxes in default, by virtue of State statutes, are not, as he is advised, any part of the taxes required by the Bankrupt Law to be paid, and that such purchasers are in no better position in that respect than would be the Treasurer.

II.

Petitioner is not aware of any other decision of an Appellate Court upon the direct questions here, but he sates that there are numerous decisions of various Federal Courts holding that purchasers at tax sales, under such circumstances, are not subrogated to the rights of public officers, and that there is a conflict of authority among the courts of the various circuits as to whether costs, penalties and interest are

parts of the taxes to be paid by the Trustee, even when the payment is to be made directly to public officers. These cases are collected in petitioner's brief filed herewith.

III.

Labor claims exist against this estate, which cannot be paid if the decree stands, and a further question will be presented, whether the claims of respondents or those of labor claimants have priority, to say nothing of general creditors.

IV.

At the time of the rendition of the decree, and up to January 28, 1915, an appeal could have been taken to this Court to review said decree. Your petitioner, feeling that the proper discharge of his duty and the doubt and conflict among the courts required him to ask a review of the decree, had caused papers for an appeal to be prepared accordingly, but that on January 28, 1915, unknown to him, and as he is advised, unknown to the profession generally, Congress had passed an Act requiring such questions to be reviewed only on certiorari, which Act, and knowledge thereof, reached Denver, Colorado, where petitioner and his counsel reside, only on the exact day that the papers and proceedings for taking an appeal had been prepared and were ready to be sent to the Circuit Court of Appeals for that purpose. Petitioner represents that such juncture of circumstances should have weight as to his being allowed to review this decree on this proceeding.

Your petitioner appends hereto his brief in support of this petition.

WHEREFORE, Your petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said Court to certify and send to this Court a full and complete transcript of the record in all the proceedings in the said Circuit Court of Appeals in the case therein entitled A. H. Stanard, Treasurer of the County of Pueblo, State of Colorado, Abel Kidd, W. H. Stansbeck, E. G. Millard, Mayme Hanlon, F. W. Roberts and J. J. Frey, appellants, vs. William L. Dayton, Trustee in Bankruptcy of the Estate of James B. Orman and William Crook, Doing Business as Orman and Crook, a Co-partnership, appellee, to the end that said case may be reviewed and determined by this Court as provided by law; and that the decree of said Circuit Court of Appeals in said case may be modified so as to direct that it be decreed that the respondents are entitled to be reimbursed and repaid by the said Trustee no sum whatsoever.

And your petitioner will ever pray.

HARVEY RIDDELL,
Counsel for Petitioner.

State of Colorado, City and County of Denver, ss.

William L. Dayton, being duly sworn, says: That he is the petitioner herein named; that he has read the above and foregoing petition, and that the facts therein stated are true as he believes.

WILLIAM L. DAYTON.

Subscribed and sworn to before me this 13th day of March, A. D. 1915.

My Commission expires Aug. 17, A. D. 1917.

ADELINE E. NORTON,
Notary Public.

INDEX TO BRIEF

LIST OF CASES CITED

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

WILLIAM L. DAYTON, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF JAMES B. ORMAN AND WILLIAM CROOK, DOING BUSINESS AS ORMAN & CROOK, A COPARTNERSHIP, PETITIONER,

VS.

A. H. STANARD, TREASURER OF THE COUNTY OF PUEBLO, STATE OF COLORADO, ABEL KIDD, W. H. STANSBECK, E. G. MILLARD, MAYME HANLON, F. W. ROBERTS AND J. J. FREY, RESPONDENTS.

BRIEF OF PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

STATEMENT.

The manner in which the questions arose below, and the course of procedure, did not require the amount in controversy to be stated. As a matter of fact, however, that amount is over $15,000. If the decree of the Circuit Court of Appeals stands, it will mean that substantially all the assets of the estate in the hands of the Trustee must be paid out thereunder. There are large sums due on priority labor

claims against the estate. It is held that such claims are inferior to the public's claim for taxes.

Guarantee T. & T. Co. vs. Title Guaranty & S. Co., 224 U. S., 152.

But it is not clear whether such claims are superior or inferior to the claims or equities of purchasers holding certificates of purchase on tax sales made after the property was in possession of the Trustee.

A large amount due unsecured creditors will, if the decree stands, go unpaid.

The questions involved have never been authoritatively settled, nor clearly settled at all; this is really the first decision of an Appellate Court passing distinctly on the questions involved.

But there is a conflict among the courts of the various circuits as to the principles which should govern these questions, as shown in this brief. The trial court disposed of these questions favorable to the contentions of the petitioner; the Circuit Court of Appeals has modified that decision in a way that practically amounts to reversing it, following or citing that line of authorities thought to support its conclusion. As there is this conflict as to basic principles, and as the petitioner believes the present decree is wrong, he feels it his duty to ask that it be reviewed so that he may correctly perform his official duties, and administer this trust estate in the way the bankruptcy act expects him to do.

Besides, the questions have doubtless often arisen, though not often reported. In fact, certain proceedings before the Referee in Bankruptcy in this Dis-

trict have been held up awaiting the decision of this case. The decree of the Circuit Court of Appeals was entered January 4, 1915. At that time it was clear that a right of appeal to this court existed. Petitioner had intended to take such appeal, and appropriate papers had been prepared accordingly. It so happened that the very day these papers were to be forwarded, an advance copy of the act of Jan. 28, 1915, was received here, and attention of petitioner's counsel was directed thereto. This act having come into existence unexpectedly, without a saving clause of benefit to petitioner, he most respectfully suggests that that fact should be accorded weight in considering his application for final instruction as to his duties.

The questions arising are these:

After real estate has passed into the possession of a Trustee in Bankruptcy and is being administered by him, is a sale of such property by a County Treasurer for general taxes and special assessments, proceeding under State statutes as if bankruptcy had not intervened, void or only voidable?

Have the purchasers at such tax sales any right or equity to demand repayment by the Trustee in Bankruptcy of the amount paid by them at such tax sales?

If such purchasers have a right or equity to demand such repayment, is it only for the principal sum of the taxes, without costs, interest and penalties, or is it for an amount including these?

If such purchasers have a right or equity as to some or all of such amounts, does that right or equity extend to requiring the Trustee to pay the same out

of the *general* assets in his hands, as if he were paying taxes due the public, or is such right or equity limited to the proceeds arising from the sale of the particular pieces of land purchased at such tax sales?

Are the costs, interest and penalties, or either of them, part of the taxes to be paid, either when payment is made directly to officers collecting for the public or when paid to purchasers at tax sales, under the circumstances here?

Are such tax sales void in the full sense that purchasers take *caveat emptor*, or are they only voidable so that they can be set aside only on equitable conditions, and if so, what are those conditions?

On January 16, 1908, the partnership of Orman and Crook, and the individual members of that partnership, were adjudged bankrupt by the United States District Court for Colorado, and on February 6, 1908, the petitioner, Dayton, was appointed Trustee in all three estates, and ever since that time has been in the possession of the real estate, among other assets, of the bankrupt estate of said firm, being the real estate referred to herein. The firm and the individual members had a large amount of creditors, and controversy and litigation immediately arose. There was a mortgage, in the form of a deed, on all this real estate, and other property, to secure partnership obligations of some Two or Three Hundred Thousand Dollars due a bank. The Trustee assaulted that mortgage as unlawful preference. After a fierce contest the mortgage was vacated at the end of two or three years' litigation. Thereupon creditors of the individual members of the firm instituted litigation, asserting that this real estate was not firm assets but belonged

to the individual members, an undivided half to each, and should be administered in that way in the individual estates. That litigation was terminated only about the time the present proceedings were begun. At that time the Circuit Court of Appeals of this Circuit had held that the bankruptcy of the firm did not include the bankruptcy of its members, but that each was a distinct proceeding. (In re Bertenshaw, 157 Fed., 363.) Hence the Trustee was unable to dispose of the property and give a clear title till the litigation as to the ownership was determined, and thus raise necessary funds. This is stated in justice to the Trustee, showing why taxes for so many years remained unpaid, and likewise accounts for the importance of the questions herein, as to costs, interest and penalties.

In the meantime, and on the 9th day of November, 1908, Stanard, as County Treasurer of Pueblo County, Colorado, sold this real estate, consisting of a large number of lots in the City of Pueblo, Colorado, at tax sale, just as if bankruptcy of Orman and Crook had not taken place, at which sale the other respondents became purchasers, each for certain of the lots; in fact the affair was much more complicated than this simple statement, the conditions as to one of these lots being typical of all. For instance, Lot 28, Block 39, was sold to respondent Millard for the taxes of 1906; sold to one Haver for the taxes of 1907; sold to Haver for special assessment for paving; sold to one Carrington for special assessment for storm and sanitary sewer, who assigned his certificate of purchase to respondent Roberts; and, on November 4, 1912, was, at another tax sale, sold to one Walpole

for the taxes of 1911. Various holders of these certificates paid taxes on these lots for various subsequent years, some for certain years and others for other years, apparently upon no system. So, as to all the lots and blocks.

Under the Colorado statute a county treasurer making sale of lands issues to the purchaser a certificate of purchase, and if the property is not redeemed from such tax sale within three years, and after the compliance with certain conditions not material here, the purchaser is entitled to a tax deed. In the meantime the amount bid bears a large penalty and interest, and to effect redemption, this, also, must be paid.

The time being about to expire, and, in fact, in some instances having expired, after which tax deeds could be demanded, but before any deeds were demanded or issued, the Trustee in Bankruptcy filed his petition in the District Court in that estate against all of the holders of such certificates of purchase, seeking the cancelation thereof, and the clearing up of these apparent encumbrances, so that the property could be sold advantageously, asking relief that the Treasurer be restrained from issuing such tax deeds; that the sales and certificates thereon be adjudged void; that the petitioner be authorized to sell the property free and clear therefrom, and that in the event it should be held that the holders of these certificates were entitled to be repaid any sum whatsoever it be limited to the funds arising from the sale of the particular pieces of property against which each held such certificates, instead of from the general assets of the estate (Rec., fol. 15).

To this, answer was filed, presenting in fact only a question of law, it being admitted that the facts stated in the Trustee's petition were true, except as to a stipulation of one fact not material here.

The trial court adjudged these tax sales void and canceled all certificates of purchase. It, however, held that the holders of these certificates should be paid the *principal* of the amount of the taxes and special assessments paid by them, without any costs, interest or penalties, except that as 10¼ per cent interest had accrued upon the taxes of 1906 at the time the Trustee took possession, that much was added to the principal of the taxes of that year, but that the repayment of these amounts should be only from the proceeds of the particular lots of which each holder was a purchaser, and not from the general funds of the estate (Rec., fols. 22-26).

Certain holders of such certificates, and who were made parties defendant to that petition, elected to abide by the decree and the Trustee was willing so to do, but certain others, being the respondents here, took their appeal to the Circuit Court of Appeals, and as to them the Trustee took his cross-appeal as to so much of the decree as adjudged that those appellants were entitled to be repaid any sum whatsoever.

On January 4, 1915, the Circuit Court of Appeals rendered its decree dismissing the cross-appeal of the Trustee, doubtless because the proper decree, according to its view, could be entered in the main appeal, and it modified the decree of the court below to such extent as amounts to a reversal of the decree of the trial court—modifying it so as to provide that the holders of the certificates of purchase

were entitled to be "reimbursed" for the sums bid at the tax sales, "together with legal interest thereon." As the last quoted language was not plain, the Trustee filed his motion that this language be made plain, and thereupon that Court interpreted the language to mean or elaborated the expression to say "together with interest thereon as provided by the laws of Colorado on redemption from tax sales of lands."

That the effect of such decree is to compel the Trustee to pay the holders of such certificates an amount as if he were redeeming from such sales, although, as petitioner is advised, such sales are void, and the effect of such decree is to make reimbursement and redemption practically identical.

The Colorado statutes (R. S. 1908, section 5537) provide:

> "All taxes shall be due and payable, one-half on or before the *last* day of February, and the remainder on or before the last day of July of the year following the one in which they were assessed. The treasurer shall receive the tax assessed against any person who may offer to pay the same, at any time after the tax warrant shall come into his hands."

Section 5538:

> "In case the first installment of one-half of any tax is not paid prior to March first in any year, then there shall be assessed against such installment a penalty of one

per cent. for each month or fractional part thereof from March first until paid, provided it is paid prior to August first, as provided by law."

Section 5690:

"On the first day of August in each year the unpaid taxes of the preceding year become delinquent and shall thereafter draw interest at the rate of fifteen per cent. per annum, but the treasurer shall continue to receive payments of the same, with interest, until the day of sale for taxes; Provided, That nothing in this section shall be construed to prevent the collection of the penalty provided for in section eleven of this act." Sec. 11 being Sec. 5538, just quoted.

This statement, based on the statutes, is made in view of the answer (fol. 20) that taxes are "due, payable and collectible" on the first day of January following the assessment. That answer presents no issuable fact, but only a question of law. It may be intended by "payable and collectible" to mean "acceptable" as a voluntary payment; but the statute is plain and means what it says. There is no default or penalty until after the last day of February, though voluntary payment may be accepted by the treasurer before that date.

Hendricks vs. Julesburg, 55 Colo., 59.

We have set forth this somewhat mixed statement of law and fact, because the question of interest

and penalties is one of the important questions in the case. Therefore, as alleged in the petition (fol. 4), the taxes assessed in 1906 became due and payable on, and began to bear penalties on, March 1, 1907, and such penalties had been running from that date when the property went into the hands of the trustee on February 6, 1908. The taxes assessed for 1907 were not due and delinquent, and had not begun to bear penalties, when the porperty went into the hands of the trustee.

Our statutes make provisions as to the steps to be taken by a county treasurer if taxes on real estate remain unpaid on and after August 1. He must publish certain notices, fix the date of sale, and at the time fixed must sell for cash, except in certain events, not material here, where the county shall bid in the property.

When sold to an outside purchaser, the statutes provide (sec. 5723) that we shall issue to the purchaser a certificate of purchase, wherein shall be stated the amount for which sold, the rate of interest, and other necessary data.

At any time within three years, or at any time before a tax deed is issued to the purchaser at the tax sale, the owner may redeem from such tax sale by paying to the treasurer for the purchaser the amount bid at the sale, with interest thereon at varying rates, depending on certain circumstances (sec. 5734); and, if redeemed, the treasurer shall issue a certificate of redemption (sec. 5736). If not redeemed, then, after three years and after certain conditions, the treasurer shall issue to the purchaser a tax deed (sec. 5726). This last section was amended by Acts of 1911 (p. 567,

sec. 4) and by Acts of 1913 (p. 569, sec. 2), but not in any respect material here.

In addition to these general taxes, there had also been levied and assessed against all the lots in Blocks 39 and 50 a special assessment in favor of the city of Pueblo for paving, and also on all the lots and block a special assessment for storm and sanitary sewer (fol. 4, 5). These are to be collected by the county treasurer in the same time and manner as general taxes.

It is not questioned that the county treasurer proceeded according to "the forms and proceedings provided by the statutes of the State of Colorado for the collection of unpaid delinquent taxes and special assessments;" and a treasurer's sale was advertised to be made, and was made, November 9, 1908, nine months after the property was in the hands of the trustee (fols. 5, 6).

At such sale a complicated state of affairs was brought about, the situation as to one of which lots being typical of all. Lot 28, Block 39, was sold to defendant Millard for the taxes of 1906; sold to defendant Haver for the taxes of 1907; sold to Haver for special assessment for paving; sold to Carrington for special assessment for storm and sanitary sewer, who assigned his certificate of purchase to defendant Roberts; and on November 4, 1912, was by the treasurer, at tax sale, sold to defendant Walpole for the taxes of 1911 (fols. 5-7). Various holders of these certificates paid taxes on the property bought for various subsequent years, some for certain years and others for other years, apparently upon no system; and

so as to all the lots and blocks, as appears from the petition at the folios above and immediately following.

The complicated condition arising from the sale seems not material to the basic question here presented—namely, whether the treasurer was authorized to proceed under the state statute at all; but if the relief granted by the court is correct, these complications become material among the holders of these certificates, and account for that part of the decree that each shall present a verified statement to the referee in bankruptcy, so that the equities between themselves may be administered (fol. 26).

The theory of the case is shown by the prayers of the petition (fol. 15), and is:

1. That the proceedings of the treasurer are absolutely void, and that the certificates of purchase are void and should be canceled; and that neither the holders of the certificates nor the county or city have any claim against the trustee or the estate in his hands.

2. That, if there are any equities or rights in favor of the holders of such certificates, they are only against the proceeds of the particular lots to which such certificates relate, and that there are no general claims, rights, or equities against general assets in the hands of the trustee (fol. 16).

The decree (fol. 22) adjudged the sale and the certificates of purchase void, and enjoined any deed thereon (fol. 24); that there was no claim against the trustee generally (fol. 25), but that the holders of the certificates should be repaid from the proceeds arising from a sale by the trustee of the particular lots against which they held certificates of purchase,

for the principal of taxes and special assessments, but not as to any interest, cost, or penalties, except that there should be added to the principal of the taxes for the year 1906 the sum of 10¼ per cent (fol. 25). This percentage, it may be stated, though it does not appear in the record, was fixed upon the statement of the county treasurer that such would have been the percentage added if the owner of the property had paid the taxes for 1906 on February 6, 1908, the date the property went into the hands of the trustee. The correctness of this per cent is not challenged in the pleadings or by assignment of error; it was put in at our suggestion, for the reason that the trustee took the property in the plight and condition it was in when he took it, and if there was any equity in the holders of these certificates, it was for the principal, penalties, and interest that had accrued at that time.

ASSIGNMENTS OF ERROR IN THE CIRCUIT COURT OF APPEALS.

Those on behalf of appellants question the correctness of the decree in every respect, and assert that the holders of the certificates of purchase have every right, and are entitled to every remedy, given by state statute, the same as if bankruptcy had not intervened (fol. 30).

Those on behalf of cross-appellant, the trustee, question the decree in the respect that it provides that holders of certificates of purchase are entitled to be paid any sum—principal, interest, penalties, or cost—out of the proceeds arising from the sale by the trus-

tee of the particular lots against which they hold such certificates, or from any source; assert such holders are not entitled to be paid any sum whatsoever, or in any manner, from any assets in the hands of the trustee (fol. 42).

It will be recalled that every step as to the collection of the taxes was taken long after the property passed into the possession of the trustee, except that the taxes for 1906 had been assessed and were overdue, and bearing interest or penalty, at that time; and except the taxes for 1907 had been assessed, but were not yet due. Every step as to taxes for 1908 to 1911, inclusive, was taken after the trustee was in possession.

II.

When Property Is in the Custody of the Court, Whether through and by a Receiver, Trustee in Bankruptcy, or Other Similar Means, neither the Title nor Possession Can Be Interfered with, nor a Lien Fixed upon It, nor a Change in the Conditions of the Property or Title Be Made, except by Permission of the Court.

Property in the hands of a trustee in bankruptcy, or otherwise in the custody of the court, is, of course, subject to taxation, both as to taxes already assessed against it and as to such taxes as may be assessed against it after it comes into the hands of the trustee.

Swarts vs. Hammer, 120 Fed., 256; affirmed 194 U. S., 441.

And special assessments are taxes, certainly, at least as to those already imposed at the time the trustee took the property.

New Jersey vs. Anderson, 203 U. S., 483.

In re Stalker, 123 Fed., 961.

Collier on Bank. (7th ed.), p. 732.

2 Remington on Bank., sec. 2153, p. 1330.

Those assessed prior to adjudication are due and owing as of the date of levy of assessment, although not collectible till after adjudication.

New Jersey vs. Anderson, 203 U. S., 483, 494.

In re Flynn, 134 Fed., 145.

Collier on Bank., p. 733.

2 Remington on Bank., sec. 2142, p. 1321.

Whether taxes are liens or not makes no difference.

Chattanooga vs. Hill, 139 Fed., 600.

New Jersey vs. Anderson, 203 U. S., 483.

The first case is cited with approval in Hecox vs. Teller Co., 198 Fed., 634.

But that such property is subject to a tax does not imply that it may be *collected* as taxes on property not so situated are collected. Property in the hands of the court, through its receiver or otherwise, cannot be levied on or sold for taxes.

In re Tyler, 149 U. S., 164.

King vs. Wooten, 54 Fed., 612.

Ledoux vs. La Bee, 83 Fed., 761.
Clark vs. McGhee, 87 Fed., 789.
High, Receivers (3d ed.), sec. 140a.

"Property constructively in the custody of the court through its receiver is not subject to sale for delinquent taxes." (Syl. 2.)

Va., T. & C. S. & I. Co. vs. Bristol Land Co., 88 Fed., 134.

"A tax deed, executed after the property has passed into the custody of a court by its appointment of a receiver for a mortgagee, is void, and ineffective to cut off the receiver's right of redemption." (Syl.)

Johnson vs. Southern B. & L. Assn., 132 Fed., 540.

That case reviews many others, and it also holds that there is no difference between legal custody and actual possession.

While property in the hands of a trustee is subject to taxation, and is subject to tax liens theretofore fastened upon it, yet the property is in *custodia legis*, and any act interfering with the court's possession, or that might ripen into an act or situation that would interfere with the court's possession, or that would cloud the title so as to interfere with the full and free disposition of the property, or with the court's full power of control and disposal thereof, and done without the court's sanction, is void; and the court of

bankruptcy may bring in all persons asserting any such rights, and adjudicate their claims.

> In re Eppstein, 156 Fed., 42; 17 L. R. A. (N. S.), 465; certiorari denied, 209 U. S., 545.

Upon the last point our court has followed that case in several others.

> In re Dana, 167 Fed., 529.
>
> Mound Mines Co. vs. Hawthorne, 173 Fed., 882.
>
> In re Rathman, 183 Fed., 913.

> "The filing of the petition and adjudication in the bankruptcy court in New York brought the property of the bankrupts, wherever situated, into *custodia legis*, and it was thus held from the date of the filing of the petition, so that subsequent liens could not be given or obtained thereon, nor proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the bankruptcy law."
>
> Lazarus, Michel & Lazarus vs. Prentice, 234 U. S., 263.

In short, it is well established that though, speaking generally, the trustee takes the property in the plight and condition in which it is at the time he takes it, and while the Bankruptcy Act does not interfere with valid subsisting liens, the time and man-

ner of enforcing them are subject to the bankruptcy court, and nobdy can acquire a lien or title, or mend his hold on a title or lien he has, except by the consent of the bankruptcy court.

These general principles serve to distinguish the two cases relied on by appellants Stanard et al. in the courts below:

Rice vs. Jerome, 97 Fed., 719.

Whitehead vs. Farmers' L. & T. Co., 98 Fed., 10; certiorari denied, 176 U. S., 682.

In both of those cases the lands had been sold for taxes and certificates of purchase issued long before the receivers were appointed; the purchasers had acquired a valid specific interest in or against the land, in the way provided by state statutes; the process provided by the state for the collection of its taxes had been followed, and everything was validly and rightfully done at the time the receivers were appointed. The court held, in effect, as stated above, that the federal courts would not interfere with the state collecting its taxes; meaning, of course, to state a correct general principle; but it did not hold that the manner of enforcing such collection, as provided by state statute, would at all times and under all circumstances be effective and administered, or even permitted, in the federal courts. It held that, while the federal courts would not undo what had already been done by the state toward collecting taxes, the further steps in that process, after the property came into the custody of the court, were subject to the control of the court, and that, unless the receivers in those

cases desired and offered to redeem, as the owner would have to do, there was no reason why the holders of the certificates might not, with the permission of the court, have their deeds.

Those cases were distinguished on that line in an opinion by now Justice Van Devanter.

In re Eppstein, 156 Fed., 42, *supra.*

In that case also the property had been sold for taxes before the adjudication in bankruptcy, and the time for redemption had been long running. The court prohibited the issuance of a tax deed and permitted redemption by the trustee, even though the time for redemption fixed by state statute had expired.

All this shows that an adjudication in bankruptcy does not divest rights then acquired, but stays all further proceedings at the point where they then were; all further steps to be under the control of the court, without which all is void. Every such step taken in this case was after adjudication and appointment of trustee, and without permission of the court.

Besides, there is a wide distinction between the action of a court, in respect to interfering with a state collecting its taxes, where the question arises in an ordinary equity action, the power arising only from the necessity of staying proceedings for a short time till it can be seen, upon principles of equity, what is proper to be done, and the action of a bankruptcy court acting under a specific statute prescribing its duties and limiting and directing what shall be done.

Nor does the Bankruptcy Act interfere, in any true sense, with the state's scheme of collecting its

taxes. The Bankruptcy Law is valid, and it is as if it were written in every state statute; it is as if every state statute for the collection of taxes had provided, as in the statute, for the collection of taxes in ordinary cases, and had then said: "*But,* in case of bankruptcy of the owner, then the collection shall be as provided in the Bankruptcy Act."

> "That policy is as much the policy of (this state) as if the act had emanated from its own legislature."
>
> Mondou vs. N. Y. etc. R. Co., 223 U. S., 1, 57.

And so it is held that the scheme for the collection of taxes, as provided by the laws of any and all the states, is superseded and unified by the bankruptcy laws as to property being administered by such courts.

Hecox vs. Teller Co., 198 Fed., 634.

That scheme is:

> "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt * * *." (Sec. 64a.)

It may be that it is the duty of the trustee to pay without an order; or that the county treasurer is not required—or, if not required, is permitted—to make a claim for taxes; or that the court *sua sponte* should order taxes paid; all of which questions, in some shape or other, have been before the courts.

But none of these questions arise here; nothing was done along any line in court. Hence, we say it is clear that appellants holding certificates of purchase at these tax sales acquired no right to require redemption or to take deed thereby, and no interest in or against the property; and that the sales and certificates are void.

III.

Are the Interest and Penalties Accruing, under the Terms of the State Statutes, for Non-Payment of the Taxes at Particular Times to Be Counted as Part of the Taxes to Be Paid by the Trustee?

The Bankruptcy Act (sec. 64a) says the trustee shall "pay all taxes legally due and owing by the bankrupt * * *." Nothing is said as to interest or penalty. In the present case, three conditions exist, and it may be important to distinguish them:

1. The 1906 taxes were due on, and began to bear interest after, February 28, 1907; in other words, about a year had run after they were thus due, before the trustee was appointed on February 6, 1908, and, of course, a slightly shorter time before adjudication on January 16, 1908.

2. The 1907 taxes had been assessed, but were not due, and would not begin to bear interest, till after adjudication and appointment of the trustee.

3. All other assessments for 1908 to 1911, and all payments of taxes for those years by holders of certificates of purchase under tax sales, and all other sales for non-payment of taxes on such assessments,

were made after the property was in the hands of the trustee and court.

That interest and penalties are not part of the taxes to be paid by the trustee seems to have been held in this circuit. In Swarts vs. Hammer, 120 Fed., 256. Nothing is said in the reported decision on this subject, but that case was affirmed in 194 U. S., 441, and it was there said (p. 444):

> "* * * the referee made an order directing the (trustee) to pay * * * the amount of the tax bill * * * 'together with the accrued penalties and fees provided by law.' The order was affirmed by the district court as to the amount of taxes, but disapproved as to accrued penalties and fees. A decree was duly entered, which was affirmed by the Circuit Court of Appeals, 56 C. A. 92, 120 Fed. 256."

As that court affirmed the District Court, and as it was in turn affirmed by the Supreme Court, it is a fair inference, we think, that the subject was before them and an opinion given that penalties, interest, fees, and costs, as they might accrue under a state scheme, do not accrue in bankruptcy and are not part of the "taxes" which the trustee shall pay. That case related to penalties and fees on taxes assessed on property after it was in the hands of the trustee, and would literally apply only to Class 3 above made; and probably to Class 2; it would not necessarily apply to Class 1, except as to interest, penalty, and costs accruing after adjudication. But it does hold that in-

terest, penalties, and costs are not inherently part of the taxes to be paid by the trustee.

An adjudication was in 1902; this is not directly stated, but it appears from a subsequent report of the case, 135 Fed., 223, that the first meeting of creditors was on December 15, 1902. Hence the case probably refers to taxes after the property was in the hands of the trustee, except possibly the taxes of 1902. The case of Swarts vs. Hammer, 120 Fed., 256, and 194 U. S., 441, is cited to the general proposition that property so situate is subject to tax, and it is said:

> "It should be noted, however, that sec. 64 of the Bankruptcy Act does not provide for the payment of interest on taxes, and the order will therefore be simply that the trustees pay the amount of the taxes without interest."
>
> In re Wm. F. Fisher, 148 Fed., 907; affirmed 153 Fed., 281, but nothing said on this point.

In New Jersey vs. Anderson, 137 Fed., 858, it is not stated whether or not interest was allowed, but on appeal, 203 U. S., 483, it was held the license fee was a tax and entitled to payment "in the amount hereinbefore indicated;" but, having thus treated of a definite sum, interest would seem not to be included. As the New Jersey case just above cited, 148 Fed., 907, denied interest, so this case seems to do the same thing.

In re Prince and Walker, 131 Fed., 546, 550 (Pa.), after holding that such property is subject to tax, and should be paid, it was said: "This includes

the penalties for non-payment, which are a constituent part of them." For this no authority is cited except a Pennsylvania case, and 27 Am. & Eng. Enc. L. (2d ed.), 778; which citations are not as to estates in bankruptcy, but refer to the ordinary situation.

Another Pennsylvania case, In re West Side Paper Co., 159 Fed., 241—a landlord's-lien case—says, *arguendo,* the same thing.

In re Kallac, 147 Fed., 276 (Amidon, N. D.), holds that taxes due and *delinquent* at adjudication of bankruptcy should be directed to be paid together with interest and penalties as provided by state law; that the usual provision that interest is not to be paid after filing petition does not apply to taxes; that the words in section 64a, "all taxes owing by bankrupt," mean whatever taxes would be owing by the bankrupt at the time payment is made had not bankruptcy intervened. There the taxes were due and delinquent, and had begun to bear interest, at the time of the adjudication, and tender was made by the trustee of principal and interest up to adjudication. Held: Interest up to the time of payment should be counted. But the opinion seems to go rather upon the supposed difference between taxes and ordinary claims, rather than upon the terms of the act. The case did not deal with penalties or interest accruing wholly after adjudication, and applies only to Class 1, above.

The only case in which that case is cited is In re Scheidt, 177 Fed., 599 (Ohio). There also the case relates only to penalties that had begun to run before adjudication, it being said:

> "No question as to taxes accruing and penalties imposed subsequent to the institution of bankruptcy proceedings is involved."

It may also be noted that the Ohio law seems to impose a flat penalty of 5 per cent once for all, and not a constantly increasing penalty from the lapse of time, as would be the case as to interest, or as to interest and penalty, under our statute; and this flat penalty had accrued before the adjudication.

Such text-writers as I have examined are not clear in their deductions. Collier (p. 734) cites the Ohio case, saying: "It has been held," etc. 2 Remington (p. 1321) says penalties must be paid; citing also the Ohio case; but in a note says it has been held *contra*, citing 148 Fed., 907, *supra*.

I have given the court a citation to all the authorities *pro* and *con*, which my search has disclosed.

There are many considerations why penalties, interest, costs, fees, and the like, upon property in the hands of a trustee, are not "taxes" to be paid. First, the text of the act does not so say. Second, there is little analogy between the situation of the owner of property and a trustee in bankruptcy in this respect. The owner knows his taxes are due, and to be paid, and that a penalty or interest will be the consequence of deferred payment. He is not limited to the particular property against which the tax is levied as a fund from which to pay. He may sell it, mortgage it, borrow money, pledge his personal credit, or raise funds in any way he desires, in order to pay. It is within his entire control to avoid or incur penalties and interest.

Not so a trustee. He has no general or personal credit, but only an official one; he must pay from funds in his hands derived from specific property; he cannot mortgage it; cannot sell it at will, but only with

the consent of the court, and often only with that of the creditors, or at least only until their objections are disposed of; he must, like any other trustee, use his best judgment as to the time and manner of disposition, so as to do the best for the creditors and others interested in the estate. It may easily happen, as is illustrated by this case, that the only available means for paying taxes must arise from the sale of the very property against which the taxes exist, and that no advantageous, or even any, sale can be made except after long litigation to clear the title, and even this not always under the control of the trustee. In short, he is, or may be, subject to conditions, situations, and surroundings beyond his own control, but controlling him and his abilities to pay.

It is also fair to suggest that, while the amount of property in the hands of the bankruptcy court is large absolutely, yet relative to the amount of other property in a given jurisdiction it is small, and the taxes thereon negligible in the economy of the state. This may well have been one consideration determining the policy of this law in providing that the state laws shall in every respect be suspended where the Bankruptcy Law applies.

This outline of the differences between an owner and a trustee will, we think, suggest the lack of analogy between them. Of course, this will count for nothing if the statute were plain and positive to the contrary; but it is legitimate to consider these differences where the words of a plainly reading statute are sought to be given a hidden meaning beyond their clear import. We think, also, this contrast weakens the authority of those cases that base the construction

of this statute on the supposed analogy between an owner and a trustee.

If the above is correct, we think it establishes:

1. That no interest, penalty, or cost is to be added to the taxes from the date of the adjudication, or, at most, from the date of appointment of the trustee. In this case there is little importance as to which date should be taken.

2. That is probably correct to say that interest and penalties accrued up to one of these dates should be paid, but that they cease to run thereafter.

3. That, if the trustee were paying the taxes, the above amounts would be all he would have to pay.

4. That the holders of certificates of purchase at tax sales, made in the circumstances of this case, are in no better situation, in this regard, than would be the treasurer.

We think they are in worse condition—a proposition we will next take up.

IV.

Taxes Are to Be Paid on Property in the Hands of a Trustee in Bankruptcy Only in the Instances and in the Way Provided by the Bankruptcy Law, and Appellant Holders of Certificates of Purchase Are Not within the Act.

Section 64a says:

> "The court shall order the trustee to pay all taxes legally due and owing by the Bankrupt to the United States, state, county, district or municipality * * *."

None of these agencies asserts any claim here; they have their money; nothing is due them. Manifestly, appellants are not within the description of persons or agencies to whom payment is to be made.

This point is so interwoven with the next below that we content ourselves with quoting, in this connection, from cases from our own circuit:

> "This portion of our labors, however, has been fruitless chiefly for the reason that the language of the Act of 1898 upon this subject appears to us to be too plain for exegesis or interpretation. Attempted judicial construction of the unequivocal language of a statute or of a contract serves only to create a doubt or to confuse the judgment. There is no safer or better canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction."
>
> Swarts vs. Siegel, 117 Fed., 13, 18.

> "The legal presumption is that the legislative body expressed its intention, that it intended what it expressed, and that it intended nothing more."
>
> Johnson vs. Southern Pac. Co., 117 Fed., 462, 465; reversed 196 U. S., 1, but not in any respect to affect this.
>
> U. S. vs. Ninety-nine Diamonds, 139 Fed., 961.

Indeed, it is by no means clear that the Bankruptcy Act may not have provided that no tax at all need be paid when the property was in the hands of the court. This doubt has been repeatedly stated, but, of course, never decided, because the act does not purport to free such property from taxation. There would seem to be much less doubt that the act can provide for the payment of only those taxes which, in some shape, the various agencies of government have not yet received; and for the want of which they may be subjected to inconvenience. In fact, the various bankruptcy acts show the legislative view that all this is in control of Congress. Thus the act of 1800 gave priority to "debts" due the United States; the act of 1841 did the same; the act of 1867 gave priority to "debts" and "taxes and assessments" due the United States, and after that debts, taxes, and assessments due the state; the present act puts the United States and the state and its municipalities on the same plane.

The acts, therefore, have always put limitations on what shall be paid, and the circumstances under which it shall be paid. Taxes due even directly to the state have no inherent quality necessitating their payment; much less, then, to an individual volunteer. For convenient summary of these statutes, see city of Waco vs. Bryan, 127 Fed., 79.

V.

If the Holders of Certificates of Purchase Are Not within the Provisions of the Act and Entitled to Be Paid by the Terms of the Act, Is there Any Other Equitable Principle under Which They Are Entitled to Be Paid?

The only equitable ground asserted in this respect, shown by the reports, is subrogation. It is to be noted that, in the process of collecting delinquent taxes in the ordinary case, bidders are by statute invited to attend tax sales, and to bid and become purchasers, and inducements are held out to them so to do, in the way of large penalties, interest, and the like. But, equally, they are notified by the very terms of the Bankruptcy Act that property in the custody of the court is not to be treated, as to collection of taxes, in the ordinary way; that the act provides the exclusive process in such cases; that sales are not made and bidders not wanted. They are put upon notice they can get no rights in such cases. But even in the ordinary case the maxim, *caveat emptor*, applies.

Where property had been sold for taxes under void proceedings, whereby the bidder got nothing, he sued the property-owner for the amount of the taxes and costs thus paid the county. The court said:

> "It is well settled that the maxim *Caveat emptor* applies to the purchaser at a tax sale, and if he fails to secure good title to the property he attempts to purchase because of the invalidity of the tax sale, he cannot recover

the amount paid therefor unless some statute in terms provides such remedy."

Mitchell vs. Minnequa Town Co., 41 Colo., 367.

In one of the cases cited in the above, the bidder at a void tax sale sought to recover the amount paid from the municipality. Held: There could be no recovery.

Richardson vs. City of Denver, 17 Colo., 398.

And so it was held in Elder, Treasurer, etc. vs. Fox, 18 Colo. App., 263.

Thus, under the very statute in pursuance of which appellants' rights arose, it is held they have no relief either against the property-owner or against the public. If they have any relief here, it must be because of some provision of the Bankruptcy Act.

True, there are many cases which hold that when the owner invokes the aid of a court to remove a cloud on the title, or to recover possession of land against which there is an irregularly issued, or even void, tax title, he must tender or repay the amount paid on such tax sale, either by virtue of some statute to that effect, as in the case of Wilfong vs. Ontario Land Co., 171 Fed., 51, cited below by appellants, or upon the general principle that he who seeks equity must do equity; otherwise the law will leave them as it finds them; of which there are several instances in Colorado based on statutes. But all such are instances where there had been abortive attempts to comply with the law; where the purchaser was invited to become such

by the law, and failed to secure himself for default in official action; where the owner was acting in his own right.

Very different is the case when there has been no attempt to comply with a law; where there is no law inviting a bidder to become such, and where the law notifies him not to interfere; where he is an interloper and mere volunteer; where the title is sought to be cleared up, not by one for his personal benefit, but as trustee and officer of the court; where the trustee is only attempting to secure, what the law says shall be done, that all persons shall keep "hands off" after property is in the custody of the court. I have seen no case, and none is cited, where the principle contended for by appellants was applied to a trustee in bankruptcy, or to one in other like relation. All that is done as to property so situate is void; not because of irregularities, but fundamentally and *in toto:* where there is not authority to take any step at all. Cases under the Bankruptcy Act on this point are few.

Where property on which taxes for several years were unpaid, and never came into the hands of the trustee in bankruptcy of the then owner, but had, previous to bankruptcy, been sold on execution, it was held that nevertheless the trustee must pay the taxes out of funds in his hands, and the city was not required to look to the property; and it was said: "The test is given in the statute;" and the city's claim came within it.

City of Waco vs. Bryan, 127 Fed., 79.

It is thus held that the plain letter of the statute controlled, and that there were no equities under its

plain provisions, as respects this tax provision. That case was where the *city* made the claim for the unpaid taxes.

Where a grantee, under warranty deed from one who long thereafter became bankrupt, paid off a judgment lien for taxes unpaid on the property while yet it belonged to the bankrupt, to prevent a sale of the property, in a state where the manner of collecting taxes of the kind was by judgment, it was held in the same jurisdiction that such grantee was not entitled to be subrogated to the rights of the city whose judgment was thus paid, but such vendee was a general creditor of the bankrupt by reason of the warranty; citing the above case.

Cooper Grocery Co. vs. Bryan, 127 Fed., 815.

Where property was sold to a third person under tax sale after bankruptcy for taxes payable before bankruptcy, the county has no further claim to be paid by the trustee, either for itself or in trust for the purchaser, and the purchaser has no right by subrogation or otherwise to be paid by trustee.

> "The purchasers of the tax certificates were not obliged to bid in the property at the tax sale in order to protect themselves. They were not mortgagees or judgment creditors, or even creditors of the bankrupt. They are third parties to the transaction, pure and simple, and accordingly cannot invoke the aid of the doctrine of subrogation."

In re Brinker, 128 Fed., 634.

The same is held by:

In re Hibbler Mach. Supply Co., 192 Fed., 741.

Text-writers cite some or all of the foregoing cases in support of their conclusion, as we contend here.

2 Remington on Bank., sec. 2148, p. 1325.

Collier on Bank., page 733 (g) (7th ed. as well as later editions), cites the Brinker case to the effect that taxes must be due the state, etc., directly; but suggests that it might be different where the property has been bought in by the public.

With the exception of one case from this circuit, presently to be noted, the above are all the cases we have been able to find on this direct subject; nor are any others referred to in recent text-books accessible to us.

The case last referred to is:

Hecox vs. Teller Co., 198 Fed., 634.

There the *county* had bid in the property at a tax sale made before bankruptcy, and itself held the certificate of purchase. After bankruptcy the county filed application for the trustee to pay the taxes for which the county held certificate of purchase. It was contended that this sale had paid the taxes, so that there was nothing due. After reviewing the Colorado statutes and decisions, it was held that the state laws did not apply and were superseded by the uniform rule of the Bankruptcy Law.

"* * * The right, if any, arises under the federal statutes." (P. 635.)

It was pointed out that under the Colorado statutes the county was not a mere volunteer at the tax sale, but was required by those statutes to bid in the property at tax sale; and that the taxes were still due the county. (P. 636.)

It was said:

> "It will be conceded that when the property is thus resorted to, and the property is sold to a third person, the public have been paid, and they have no right to ask payment again, and the person who has bid the property in is not the United States, state, county, district, or municipality, and there is no provision for payment to him, and he is not entitled to preference upon the ground of subrogation, or for any other reason." (P. 635.)

Whether the court stated these propositions merely by way of concession for the purposes of that case, or meant it to be a decision on that point, it in any event formulates a proposition in harmony with other cases and with principle. If, as there stated, a purchaser of valid certificates of purchase at a sale made before bankruptcy is not entitled to subrogation or to require the trustee to pay him out of general assets, much less would a holder of such certificates obtained at a sale absolutely and intrinsically void under all circumstances.

A holder of valid certificates of purchase at a sale before bankruptcy cannot call on the trustee to pay him; but, as the Bankruptcy Law does not divest valid liens or interests, the trustee must redeem from such

sale, or in some way remove, such certificate before he can claim the property free from encumbrance; and if he refuses to do so, the court may permit the purchaser to take tax deed.

In re Eppstein, 156 Fed., 42.

The holders of certificates of purchase here have acquired them under circumstances utterly lacking any element entitling them to the same consideration. They have merely clouded the title of the property, without right or authority, and this the trustee seeks to clear up for purposes of sale. It does not seem that the same equity can arise to a wrongdoer that arises to one complying with the law. These bought *caveat emptor;* they were mere volunteers; they cannot, voluntarily and against the law, cloud the title to this land and insist that a so-called equity shall be administered for their benefit to clear up what they without right imposed upon it.

> "One of the principles lying at the foundation of subrogation in equity * * * is that he must have (paid a debt) under some necessity, to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor * * *."
>
> Aetna Life Ins. Co. vs. Middleport, 124 U. S., 534, 547.

Pursuing that subject farther, the court said:

> "There was no obligation on account of which, or reason why, the complainant should

> have connected itself in any way with this transaction, or have paid this money, except the ordinary desire to make a profit * * *."

The court approves Sheldon, Subrogation, section 240:

> "The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any right or property of his own."

The doctrine applies only to those who are already bound and who cannot but choose to abide the penalty; not to those who are in position to elect; never to mere volunteers.

> Prairie St. Nat. Bank vs. U. S., 164 U. S., 227, 231.
>
> O'Brien vs. Wheelock, 184 U. S., 450, 495.

There may be instances where the holder of a void instrument could recover against the municipality issuing it, or be subrogated, as against the issuing party, to some right that would have been valid and for which the void act was intended as a substitute, and where there were special circumstances giving rise to an equity, as in:

> Board of Comr's vs. Irvine, 126 Fed., 689; certiorari denied, 192 U. S., 607.

But here is a third party in no way connected with the transaction out of which the supposed right arose.

There are no special circumstances; only the ordinary case of a tax-buyer going into the matter as a speculation for large profits. In this state, however, the very statute under which action was taken gives them no right to recover, either against the property-owner or against the public, in such cases.

In tax matters the right is at least equally limited; there must be some relation between the one who pays and the person to whom, or the property on which, it is paid, to raise this equity.

> 27 Am. & Eng. Enc. L., p. 263 (2d. ed.), and cases cited.

But—

> "One who voluntarily pays a tax to a city, for which neither he nor his property is liable, is not entitled to be subrogated in equity to the rights of the city as against the property or its owner." (Syl.)
>
> Montgomery vs. City Council of Charleston, 99 Fed., 825; 48 L. R. A., 503.
>
> Mercantile Trust Co. vs. Hart, 76 Fed., 673; 35 L. R. A., 352.

There are many cases to the same effect, some saying that the remedy given the state is not capable of being farmed out or be made the subject of subrogation.

VI.

It may be that conditions may exist creating an equity, possibly not referable to any theretofore recognized classification, and that a Court of Bankruptcy may be more equitable than a Court of Equity or law.

Hurley vs. Atchison, T. & S. F. R. Co., 213 U. S., 126.

But such cases arise from the voluntary acts or contracts of those against whom the right is asserted, or their representatives. It never arises in behalf of a mere stranger or volunteer.

No one can make himself a creditor of another merely by paying a debt that other is bound to pay, and thereby raise an equity in his favor.

Hammond on Contracts, sec. 433.

Possibly there may be ratification of the unauthorized act so that a mere volunteer can collect from the original debtor, but in this case the trustee has done nothing at all; no demand has been made for these taxes; no refusal to pay the treasurer; no assertion by the treasurer that anything is due. At most, the claim would arise from contracts.

But, aside from this, the Court of Appeals seemed to have avoided a reference to any definite principle upon which its opinion rested by didactically classing the question under the miscellaneous heading of "reimbursement." Having so put it, it then abandons the principles governing the relief appropriate thereto.

Reimburse is "to pay back again," Anderson's Law Dict. It would certainly appear that where these

purchasers have voluntarily paid out moneys in instances where they were under not the slightest obligation to pay, they would receive all the "reimbursement" the widest equity could award them if they got their money back, and, at most, if they got it back with the ordinary rate of interest for the loan, retention or withholding money, which, in Colorado, is 8 per cent.

R. S. 1908, secs. 3161, 3162.

Certainly under guise of "reimbursement," they are not entitled to be in fact subrogated to the most extreme right to which one could be entitled under any view; not to the rights of a purchaser at such sale before bankruptcy; not to that of the treasurer, even assuming he could have demanded the extreme penalties and interest accruing on defaulted taxes; not to the rights of one entitled to insist on redemption. The decree makes "reimbursement" identical with redemption.

We, therefore, respectfully submit:

1. That the trial court gave the holders of these certificates of purchase the most they could be entitled to in any view; that is to say, the principal of the taxes, together with interest and penalties up to the date the trustee was appointed, and the principal only after that date; that this was all the county treasurer could have received, had the taxes been due and collected by him, and that this sum be paid only out of the proceeds arising from the sale of the particular lots to which such certificates, respectively, relate. This is the most, as to this point, they would have by the state statutes under which they claim.

2. But we respectfully submit the trial court erred in decreeing them that much; that they are entitled to nothing, in any way; that the Circuit Court of Appeals still further erred in adjudging that the trustee must, in effect, redeem from such sales, and pay interest and penalties accordingly; that "reimbursement," at most, should be only the amount paid with the ordinary rate of 8 per cent per annum.

Respectfully submitted,

HARVEY RIDDELL,
Attorney for Petitioner.

In the Supreme Court of the United States

October Term, 1914.

WILLIAM L. DAYTON, *Trustee in Bankruptcy, Etc.*,
Petitioner,
v.
A. H. STANARD, County Treasurer, *et al.*,
Respondents.

No. 404

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BRIEF OF RESPONDENTS.

HORACE PHILPS,
Attorney for Respondents.

Rocky Mountain Printing Co., 1621 Glenarm St., Denver, Colo.

In the Supreme Court of the United States

October Term, 1914.

WILLIAM L. DAYTON, Trustee in Bankruptcy, Etc., *Petitioner,* *v.* A. H. STANARD, County Treasurer, *et al.*, *Respondents.*	No. 880.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BRIEF OF RESPONDENTS.

In this case a writ of certiorari was granted by the Supreme Court of the United States, and this brief is filed in reply to the brief of the petitioner filed in his application for the writ, my understanding being that he makes that brief his brief in this cause.

The petition for the writ appears at pages 2 to 11 in the petitioner's motion. There are some statements made in the petition to which I desire to call this Court's

attention before proceeding with my answer to the brief.

My understanding of the law is, that this petition is to be verified and should set forth the points of law and fact appearing in the original record upon which the petition is based, and that no new facts may be injected other than those appearing in the original record, except the fact as to the amount in controversy and as stated by the petitioner, the amount of these taxes exceeds $15,000.00.

The original petition upon which the decree of the District Court of Colorado was granted and upon which the United States Circuit Court of Appeals determined the matter is found in pages 1 to 9 of the record filed in the United States Circuit Court of Appeals and brought to this Court by stipulation. An examination of that petition will not disclose that the firm of Orman & Crook as a firm and as individuals had a large amount of creditors, or that there was a mortgage on this land, or that the trustee assaulted it, or that it was vacated, or that the land belonged to anyone else, or that there was any litigation, or that the trustee was unable to dispose of the property or give a clear title to it, nor was any reason given in that petition why these taxes had not been paid. If all of these reasons had been set up, the United States Circuit Court of Appeals might or might not have resolved them; issues of fact might have been raised upon them which cannot now be raised. Whether or not these things would have affected or might affect here the decision, I am not prepared to say, because they have never been presented in a form to elicit examination or determination as issues of fact, or questions of law.

On page 9 of his petition, at paragraph III, the petitioner states that labor claims exist against this es-

tate which cannot be paid if the decree stand, and a further question will be presented, he says, whether the claims of these respondents or those of labor claimants have priority. This statement has no other foundation in this record anywhere than this statement itself, but if it were true, I have never known of a case where claims for labor, general creditors or anything else took precedence over taxes due to the municipality, the State or the Federal Government; in fact, the very foundation of taxation is that it takes precedence over everything else, because it is levied and collected primarily for the support, maintenance and defense of the Government.

It appears to me, therefore, that counsel has misconceived his right and his remedy here, and this I will undertake now to show, and in doing so I desire to make a statement here of what appears to me from the record to be the facts which were before the United States District Court for the District of Colorado, and which were before the United States Circuit Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE.

On the 16th day of January, 1908, James B. Orman and William Crook, partners doing business as Orman & Crook, filed their petition in voluntary bankruptcy in the District Court of the United States for the District of Colorado, and on said day were adjudged bankrupts, and thereafter William L. Dayton, Esq., was appointed trustee in bankruptcy to take charge of their estate.

And, thereafter, on the 10th day of July, 1912, the said Dayton, as trustee, filed his petition in the Circuit Court of the United States for the Circuit of Colorado against the appellants, which petition is found on pages 1 to 9 of the record, in which he sets forth that among

the assets of the estate which came into his possession as such trustee were certain lots and blocks in the City of Pueblo, County of Pueblo, and State of Colorado; that the general taxes and certain special taxes for the years 1906 and '07 were then assessed and due against the property. That Stanard is the County Treasurer of Pueblo County.

That on the 9th of November, 1908, and at various times thereafter, the taxes remaining unpaid, the treasurer, in pursuance of a notice as provided by statute, proceeded to sell said lots and block for the taxes of 1906 and '07, and certain special assessments, for paving, etc., in the City of Pueblo.

The petition shows that the tax sales were held at different times up to 1912, and shows that the purchasers at the tax sales, who are the other appellants, from time to time paid certain subsequent taxes, and that the said appellants are now the owners of certificates of purchase issued by the treasurer on said tax sales to them. That a notice was served in form as required by law to the treasurer that tax deeds would be issued on these certificates. That unless restrained by this Court, the treasurer will issue the tax deeds. That the treasurer was not authorized by law to make the sales and that the sales are void. That it would be for the benefit of the estate and the various creditors thereof that the property now be sold by the trustee, freed from the lien of taxes and special assessments. The petitioner prays that the County Treasurer be enjoined from issuing any tax deeds. That the tax sales be adjudged to be void. That the trustee be authorized to sell the property, free and clear of taxes and special assessments, and that the defendants, and each of them, be required to look to the proceeds of the sale of the property only for any claim

or demand or right which they respectively hold by reason of the premises, and that they present to the court whatever claim or demand they, or any of them, have, to be paid out of the proceeds of the sale against which they hold the certificates of purchase, if they be adjudged to have any claim at all.

The appellants moved to dismiss the bill, on the ground that the facts stated therein were insufficient to constitute a cause of action (page 9 of the record), and also moved to dissolve the temporary restraining order. The motion to dismiss was also denied (page 10 of the record). Thereupon the appellants filed their answer (as appears on pages 10 and 11 of the record), in which they set forth by denial that the taxes of 1906 and '07 were due and payable and collectible at the time of the adjudication of bankruptcy, and that said taxes were a lien upon said lands of equal force and dignity. They deny that the County Treasurer was not authorized and empowered to sell said property for taxes. Deny that the sale was void. Deny that the certificates of purchase were void, and deny that the treasurer had no power to issue tax deeds, and they deny that it was for the benefit of the estate or the various creditors thereof that said property be sold, freed of the lien of taxes and special assessments, and they say that the matters and things set forth in the bill were insufficient to warrant the granting of the relief prayed for by the trustee, or any relief.

The cause came on for hearing before the court, and on the 16th of March, 1914, the court rendered its decree (as exhibited on pages 11 to 14 of the record), in which the court ordered that the tax sales were utterly void and of no effect. That each and every of the certificates of purchase were null and void and are cancelled

and for naught held, and that the treasurer is perpetually enjoined from issuing any tax deeds thereon, and that the trustee shall sell said land, free of the lien of all of said taxes, and that none of the appellants have any claim or demand upon said trustee or upon the general assets of said bankrupt estate, and that no part of the same be paid from the general funds or assets of the estate.

It is further ordered that the respondents who became a purchaser or assignee of a purchaser of any of the land at the tax sale of November 9th, 1908, has a right to be paid out of the proceeds arising from the sale by the trustee of that particular lot or parcel as to which said respondent or his assignor holds any certificate of purchase, but not otherwise, for the amount of taxes for the year 1906, and for interest which may have accrued up to February 6th, 1908, and for the principal sum of any subsequent taxes that may have been paid by them, without interest or penalty subsequent to February 6th, 1908.

It is further ordered that the respondents shall file their claim with the Referee in Bankruptcy for said taxes, which shall be paid out of the proceeds of said sale only, so far as any particular tract of land shall realize that sum, as hereinabove stated.

The respondents then took their appeal to the United States Circuit Court of Appeals for the Eighth Circuit. The cause was numbered 4218, December Term, A. D. 1914. On January 4th, 1915, the United States Circuit Court of Appeals (on the record as made and which is now on file in this Court) promulgated their opinion, speaking through Judge Youmans, and a copy of this opinion is, of course, before this Court.

BRIEF AND ARGUMENT.

The general revenue laws of the State of Colorado are voluminous, and I am calling the attention of the Court of Appeals to certain sections of our statutes in Colorado applicable to the rights of the appellants in this case. Each reference to statutes of Colorado herein made are made to the Revised Statutes of Colorado, edition of 1908.

Section 5528 of the Revised Statutes of Colorado provides for the levying of taxes for the support and maintenance of the government in the State of Colorado.

Section 5529 provides that all taxable property shall be assessed each year.

Section 5542 provides that taxable property includes real estate in Colorado.

Section 5530 provides that taxes assessed and levied shall be a perpetual lien on the real estate, and this doctrine is affirmed in the case of Pelton v. Muntzing, 24th C. A., pages 1, 9.

Section 5671 and following provides when and how taxes shall be collected.

Section 5706 and following provides for sale of lands for delinquent taxes, how the same shall be conducted, the issuance of deed, etc.

Section 5733 and section following provides how lands may be redeemed from tax sales.

It has also been decided in this state, in the case of Mitchell v. Minnequa Town Company, 41st Colo. 367, that, whereas, the tax purchaser cannot force a foreclosure of his lien or a collection of the taxes, his lien cannot be destroyed except by payment thereof, and it will also be observed from the allegations in the bill in this case, that no tender of these taxes or payment was

ever made by the trustee. We maintain that this failure to tender or to plead a tender is absolutely fatal to this bill, and in support thereof we cite the following cases:

Rice v. Jerome, 97th Fed. 719, wherein Jerome was a receiver appointed by the United States Circuit Court in Colorado.

Whitehead v. The Farmers' Loan & Trust Company, 98th Fed., page 10.

And the doctrine announced in the two cases above was reaffirmed in the case of Wilfong v. The Ontario Land Company, 171st Fed. 51, a case which arose in the State of Washington.

In the case *In re* Eppstein, 156th Fed., page 42, a bankruptcy case, the cases above cited were reaffirmed, and held that even in bankruptcy proceedings the lien of a tax purchaser could not be destroyed without payment of his taxes.

The Bankruptcy Act of the United States provides, Section 64, that the court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors. This is the only provision of the Bankruptcy Act of 1898 relative to the subject of taxation and payment of taxes, and we submit that it never was intended by Congress that this should work a destruction of the lien given by the statutes of the state without redemption or payment of the full amount of the taxes, interest and penalties provided by law and given to a tax purchaser, as was well stated by Judge Adams in the Whitehead case, 98th Fed., pages 10, 13. This right to sell for taxes and the right of a purchaser to buy is an integral and necessary part of the revenue scheme in the State of Colorado, and

Federal courts will not and may not in any respect limit or disturb it. Hence we say, that before the District Court of the United States in an action brought by the trustee in which these tax purchasers are defendants or respondents, before that court can declare these tax sales to be void or the certificates to be void or destroy the lien and relegate us to the condition of a general creditor, they must redeem from these tax sales strictly, pursuant to the provisions of the statutes of Colorado, because as was said by Judge Adams in the Whitehead case, *supra:*

> "If you deprive a tax purchaser of the full rights which the state government would have, the efficiency of the whole scheme of taxation in Colorado fails to accomplish its purpose, and if it be said that a purchaser at a tax sale is a mere volunteer and not entitled to the protection of equitable principles, there would be few purchasers, and as a result the machinery of the State of Colorado for securing its revenue would be seriously crippled."

Now I may be anticipating the brief and argument of counsel for the appellee when I say that he cited a great number of cases at the hearing of this cause which, in my opinion, did not then and do not now have any application to the facts as disclosed by the record in this case. Let it be borne fully in mind that these appellants are not here as plaintiffs or petitioners, seeking to recover these taxes against the trustee as Treasurer of Pueblo County might have done. They are here as respondents or defendants, seeking to preserve their rights and to prevent a destruction of their lien, and no more.

The provision of the bankruptcy statute above cited is entirely plain that no one but a representative of the taxing power can maintain a suit or bill or petition against the trustee to enforce the collection of taxes.

One of the cases relied upon by the petitioner is the case of Hecox v. Teller County, 198 Fed. 634, and it seems to me that that case supports the contention which I here make, that is: That while these tax purchasers could not maintain a bill to compel the payment of the money by the trustee, because they are not in the class mentioned in the Bankruptcy Act, yet their lien could not be destroyed without paying them off in full, and this case and those to which I will call the Court's attention proceed on the theory of the bankruptcy law, that these taxes are payable by the trustee, not because they are a lien, but because the act says they shall be paid ahead of anything else. When the Treasurer or other representative of the taxing power brings his action against the trustee for taxes, no question of lien is involved; no question of subjecting the particular property is involved, because the trustee must pay the taxes irrespective of the value of the property, irrespective of the title at the time of the bankruptcy, and irrespective of any lien on any specific piece of property, and the Bankruptcy Act being thus interpreted by the Federal Court has no application to the case at bar, where tax purchasers who, as this Court has said, stand in the place of the taxing power, so far as the lien is concerned, are doing nothing except objecting to the destruction of the lien which the statutes of the State of Colorado gave to them and which, so far as we are able to find, no statute of the United States or decision of any court of the United States has attempted to take away from us. On this particular point the case of Swarts v. Hammer,

120th Fed., page 256, is significant and instructive, and the language of Judge Caldwell in that opinion is respectfully urged to this Court.

Another case of interest is the case of Ledoux v. LaBee, 83rd Fed. 761, where the rule is laid down that a valid tax upon the property in the hands of a receiver (and I can see no difference in the case of a Trustee in Bankruptcy) constitutes a claim upon the assets of the estate, and the lien can be enforced only under the sanction of the court. But, let it be kept at all times in mind that the appellants are not in this suit attempting to enforce a lien.. It is true the land was advertised to go to tax deed, and I think, perhaps, an injunction restraining the issuance of tax deed on lands in the hands of a Trustee in Bankruptcy would be sustained, but in this case the court went further than that, and not only enjoined the issuance of a tax deed, but proceeds further to destroy the lien of these appellants without rendering them any compensation whatever.

Another case which counsel cited below was the case of Virginia Company v. Bristol Company, 88th Fed. 134, where the United States District Judge in Virginia held a tax sale of property in the custody of the law to be void, but in the last lines of the opinion on page 140 the court said:

> "A decree will be entered at the present term directing a sale of all of the property of the Bristol Land Company and providing for the payment as first lien of all taxes due the commonwealth of Virginia."

And the case *In re* Kallak, 147th Fed. 276, compels the trustee to pay certain taxes with the penalties and interest thereon accrued under the laws of the state to

the time of payment; and *In re* Scheidt Bros., 177 Fed. 597, interest and penalties on the taxes were allowed as provided by statute.

Under the above authorities this decree should be reversed, because no interest or penalties whatever were allowed to these tax purchasers, and the case which I have heretofore cited, 98th Fed., page 10, holds that these tax purchasers stand in the same relation as a state or county. The only difference is that they cannot enforce their claim by compelling the trustee to pay, regardless of their lien, but I again reiterate that under these authorities their lien cannot be destroyed by the trustee as an actor without first discharging it in full. If these sales were invalid and should not have been made, and these tax purchasers stand in the place of the county, they would be entitled to the rate of interest on delinquent taxes at any rate, which is 15% per annum from the first of August of the year when the tax was payable, under Section 5690, Revised Statutes of Colorado, and that rate is higher than the maximum rate of interest granted to tax purchasers under Section 5734 of the Revised Statutes, providing for redemption from tax sales.

In the case of *In re* Conhaim, 100 Fed. 268, the United States District Judge said:

> "That the manifest intent of the law is that while the estate is in the hands of the trustee, his custody shall not constitute a barrier to prevent the collection of taxes which would be collectible under the law, if the property had remained in the possession and control of the bankrupt himself."

These appellants are making no attempt in this Court, or in the court below, to collect these taxes. They are simply, as I have repeatedly said herein, contesting as defendants the right of the United States Court to destroy their lien or disturb it without paying it off. Let it be understood that I am making no complaint against an injunction restraining them from taking a tax deed, so long as that injunction leaves them exactly where it found them, in possession of their lien for taxes, they standing in the place of the county, as was said by Judge Adams in the case in the 98th Federal.

It may be said, and the case of Mitchell v. Minnequa Town Company, 41st Colo., may be cited to show that the doctrine of *caveat emptor* applies to a tax purchaser. We do not dispute this proposition laid down in that case, which is, that he buys with knowledge of the limitation upon his right to enforce his lien or recover his money, but that case, while applying the doctrine to Mitchell, at least left him where he was found, and that is all we ask in this case.

It is alleged in the bill of complaint that it would be of advantage to the estate to sell these lands free of the tax liens. We call the Court's attention to the fact that there is not a particle of proof offered in support of this allegation.

Nor is there any allegation in the bill or any proof that this trustee has not been at all times able to pay these taxes and fulfill the duty of Section 64 of the Bankruptcy Act, imposed upon him, of paying these taxes. As the record shows, Orman & Crook have been in bankruptcy for more than six years, that their taxes are delinquent for eight years, and that during all of this time the trustee has made no effort to pay these taxes or perform the duty of Orman & Crook or himself

as trustee to the State of Colorado, in rendering his proportionate assistance to the maintenance of government in this state.

I do not think it would be wise to discuss all of the cases cited in his brief by counsel for the petitioner, but I will notice one or two which he cites, and also one which is not cited but on which I am informed he relies, which was discovered since his petition and brief were filed; and I do this to show that, as stated in the beginning, counsel has, in my opinion, misconceived the law as applied to the facts in this case. For instance, *In re* Brinker, 128 Fed. 634, cited by counsel on page 33 of his brief, reading the extract which he has quoted, one would be led to think that it applied to the facts in this case, but upon reading the case entirely, the Court will note very quickly that while the court does not order the payment of the tax by the trustee, it is very careful not to disturb or destroy the lien of the taxes which went from the taxing power by the tax sale to the purchaser and holder of the tax sale certificate.

On page 14 of his brief, under sub-division II, counsel states that when property is in the custody of the court no lien can be fixed upon it, and then the cases which he proceeds to cite show that it may be taxed and the lien for taxes exists, and this is especially true under the case of Swarts v. Hammer, 120th Fed. 256.

On page 25 of his brief counsel discusses the proposition that there are many considerations why penalties, interest, costs, fees and the like upon the property in the hands of a trustee are not taxes to be paid, because the text of the Bankruptcy Act does not so state, but as I have said repeatedly, let it be borne in mind that these respondents are not here asking anything against the trustee or any funds in his hands.

Counsel then lays down the proposition that the holders of tax sale certificates in Colorado have no rights, because of the Bankruptcy Act, but he has not cited a case, and I think it is no stretch of the imagination to say that he cannot cite a case holding that the lien of the County of Pueblo for these taxes, when transferred for full value to these respondents and evidenced by tax sale certificates, is thereby automatically destroyed. The taxing authorities are given certain rights under the Bankruptcy Act to enforce collection out of the bankrupt's estate, regardless of the lien, which right unquestionably does not come to the holders of the tax sale certificates, but under all of the authorities which I have been able to investigate, no intent is disclosed to destroy the lien, but, in fact, effort is made to preserve it both as to the original sum and the interest and penalties, whatever they may be.

Counsel also lays some stress on the proposition and cites some cases, that where the tax itself is void, the holders of these certificates, under the doctrine of *caveat emptor*, could not recover either from the trustee or from the taxing power. The proposition of law which he lays down is universally true, but it has no application here, because there is not a thing in this record indicating that the tax, the levy or the assessment was ever void or questioned, but the rule is universal, that even though the proceedings of the sale are void, still the owner of the certificate must have his money before the lien can be destroyed. This was laid down in Colorado in the case of Pueblo Realty Company v. Tate, 32nd Colo., 67, and has been affirmed in numerous cases in this state and is the general doctrine laid down in such works as Black on Tax Title, Cooley on Taxation, Desty on Taxation and any other author on the subject with which I am

acquainted. But aside from this, it was alleged in the bill of complaint originally in this cause that these tax sales were void, and that was denied in the answer, found at pages 10 and 11 of the original record sent up to this Court from the Court of Appeals, and no proof was offered on this issue at all; in fact, the question never has been before any court determining this case whether these tax sales or the tax itself was void, and while tax sales as a rule are void, I know of no presumption that they are void in the absence of any proof whatever.

Coming now to the question of interest and penalties, I know of no other cases than those which I have already cited herein, together with the opinion of the United States Circuit Court of Appeals, except the case of Coy v. Title Guarantee & Trust Co., reported in the 212th Federal Reporter, page 520, and affirmed by the Court of Appeals in 220 Fed., page 90. I understand that counsel for the petitioner relies somewhat on that case, and for this reason I will discuss it briefly in its application to the case at bar.

Taxes on real estate in this state become a perpetual lien from the time of their levy.

> Revised Statutes of Colorado, 1908, 5530;
> Pelton v. Muntzing, 24th C. A., page 1, page 9.

Taxes on realty in this state can only be collected in two ways: One by the voluntary payment and the other by the sale of the property to tax buyers. There is no other way that the lien can be enforced.

> Mitchell v. Minnequa Town Co., 41st Colo., 367.

As to personal property, the lien is perpetual, but the method of collection is entirely different. If the taxes on

personal property is not paid, it becomes the duty of the treasurer to destrain or seize it as upon execution, reduce it to absolute possession, sell it at public vendue and pass the title to the purchaser.

Revised Statutes of Colorado, 1908, Sections 5677 and 5678.

Manifestly there can be no destraint or seizure or sale of personal property in the hands of the court, either by a receiver or a trustee in bankruptcy. Now the case last above cited in the 212th Federal is this:

These were personal taxes; there had arisen a dispute between the collecting power in Oregon and the receiver long before the petition was filed for the collection. The opinion is a well reasoned one and holds that the right to levy and assess the tax existed, that the right to have it paid existed, but denied the power to the interest and penalties, because the collecting power knowing of the dispute, knowing of the intent on the part of the receiver to resist the collection of the taxes, made no attempt to collect it nor to secure the aid of the court appointing the receiver in collecting it for years and until the interest and penalties had become somewhat enormous. Here the Court will readily see was an equitable reason, but in the case at bar there is not, from cover to cover of this record, the slightest intimation which this Court may consider why these taxes have not been paid or tendered, nor is there any statement anywhere that the tax was void or unreasonable or unjust, nor is there anywhere any intimation of interference with the trustee, except the attempt to take out tax deeds, and, as to that, I have already admitted that the respondents had no right to take the deed, and evidently the Court of Appeals took the same view, because they affirmed the

decree of the District Court and the injunction against those deeds still stands.

In the case we have just been discussing, there was an equitable reason and right reason in the receiver, but here there is none. Here was an estate of great value, as shown by the amount of taxes, more than $15,000.00, and yet this trustee, without any showing of inability, has utterly failed to pay these taxes, and I submit that it was a considerable item to the support of the State of Colorado, of the various school districts in Pueblo County, of the county government of Pueblo County and of the city government of the City of Pueblo, and it strikes me that under the case we have just discussed, if under no other, the decree of the United States Circuit Court of Appeals for the Eighth Circuit should be affirmed. Certainly if principles of equity are invoked, these respondents, who came forward and paid the money to the County of Pueblo, stand in a better position and in more favor with courts of equity than this trustee or this estate, which has disclosed no effort whatever to pay these taxes and no reason why they did not pay them.

Respectfully submitted,

HORACE PHELPS,
Attorney for Respondents.

DAYTON, TRUSTEE, ETC. *v.* STANARD, TREASURER OF PUEBLO COUNTY, COLORADO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 404. Submitted January 7, 1916.—Decided June 12, 1916.

Under § 64a of the Bankruptcy Act the holders of tax certificates who have paid taxes and assessments on property of the bankrupt at tax sales of such property, which sales have been declared invalid, are entitled to be reimbursed the amount paid, on cancellation of their certificates, out of the general fund of the bankrupt's estate, with legal interest, but not with the larger interest and penalties imposed by statute in tax sale redemptions.

220 Fed. Rep. 441, modified and affirmed.

THE facts, which involve the rights, under § 64a of the Bankruptcy Act, of the holders of tax sale certificates of land of the bankrupt, are stated in the opinion.

Mr. Harvey Riddell for petitioner.

Mr. Horace Phelps for respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a controversy growing out of the sale for taxes and special assessments of divers tracts of real property belonging to a bankrupt estate then in the course of administration in a court of bankruptcy. The property was in *custodia legis* and was sold without leave of court. Because of this the court held the sales invalid and entered a decree canceling the certificates of purchase and enjoining the County Treasurer from issuing tax deeds thereon. Thus far there is no room to complain. *Wiswall* v. *Sampson*, 14 How. 52; *Barton* v. *Barbour*, 104 U. S. 126; *In re Tyler*, 149 U. S. 164; *In re Eppstein*, 156 Fed. Rep. 42. The court further directed in its decree that the several tracts be sold by the trustee free from any lien for the taxes and assessments, and that the holders of the certificates of purchase be severally reimbursed out of the proceeds of the respective tracts, but not out of the general assets, for the taxes and special assessments paid thereon, with the interest and penalties which accrued prior to the time the trustee took possession. Upon appeal to the Court of Appeals that court modified the decree by requiring that the certificate holders be reimbursed for the amounts paid at such sales and for subsequent taxes, together with interest thereon, "as provided by the laws of Colorado on redemption from tax sales of land," the same to be paid "out of the general fund, regardless of the amount which the property may bring at bankruptcy sale." 220 Fed. Rep. 441.

The trustee urges, first, that the certificate holders should not be reimbursed at all; second, that, if reimbursed, they should not be allowed any interest or penalties other than such as accrued prior to the time when the trustee qualified and took possession, and, third, that they should not be reimbursed out of the general

assets, but only out of the proceeds of the trustee's sale of the tracts for which they severally had certificates.

Considering the plain provision in § 64a of the Bankruptcy Act of 1898 (30 Stat. 544), that "the court shall order the trustee to pay all taxes legally due and owing by the bankrupt . . . in advance of the payment of dividends to creditors," we entertain no doubt of the propriety of requiring that the certificate holders, who had paid the taxes and assessments at the sales, be reimbursed upon the cancellation of their certificates, or of requiring that the reimbursement be out of the general assets. The taxes and assessments were not merely charges upon the tracts that were sold, but against the general estate as well.

And while we are of opinion that the certificate holders were entitled to interest upon the amounts paid at the ordinary legal rate, applicable in the absence of an express contract, we think they were not entitled to the larger interest required to be paid on redemption from tax sales. They were not in a position to stand upon the terms of the redemption statute, for the sales were invalid, and the only recognition which they could ask was such as resulted from an application of equitable principles to their situation. The decree of the Circuit Court of Appeals is modified to conform to what is here said respecting the allowance of interest. In other respects it is affirmed.

Decree modified and affirmed.